

JAN 17 1969

JOHN F. DAVIS, CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1968 1969

No. 528 ✓ 9

NACIREMA OPERATING Co., INC., et al.,

Petitioners,

—v.—

WILLIAM H. JOHNSON, et al.,

Respondents.

No. 563 ✓ 16

JOHN P. TRAYNOR AND JERRY C. OOSTING,  
DEPUTY COMMISSIONERS,

Petitioners,

—v.—

WILLIAM H. JOHNSON, et al.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FOURTH CIRCUIT

NO. 528 PETITION FOR CERTIORARI FILED SEPTEMBER 16, 1968

NO. 563 PETITION FOR CERTIORARI FILED OCTOBER 17, 1968  
CERTIORARI GRANTED DECEMBER 9, 1968





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## DOCKET ENTRIES BELOW

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*United States District Courts*

Date	Filings — Proceedings
June 25, 1964	Complaint[s], filed. [Appeals from orders of Deputy Commissioner Traynor in Johnson case (D. Md. Admiralty No. 4704); and Klosek case (D. Md. Admiralty No. 4705).]
February 19, 1965	Complaint filed. [Appeal from order of Deputy Commissioner Oosting in Avery case (E. D. Va. Civil Action No. 4976).]

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*United States Court of Appeals for the Fourth Circuit*

[The following entries pertain to the Avery case, No. 10,323. For each entry below, the same transaction occurred in the Johnson case, No. 10,298, and in the Klosek case, No. 10,299, on the same date as indicated for the Avery case. The substantially similar entries for the Johnson and Klosek cases are omitted as surplusage.]

February 9, 1966, (February Session, 1966) cause came on to be heard before Haynsworth, Chief Judge, Sobeloff, Circuit Judge, and Hutcheson, District Judge; and was argued and submitted. [Johnson and Klosek cases were argued before the same panel on the same date.]

November 6, 1967, order setting down case for reargument en banc at February 1968 session and setting dates for the filing of supplemental briefs and appendices for the respective parties filed. Joint with 10,060 [Vann case for which no application for certiorari was filed], 10,298 [Johnson case] and 10,299 [Klosek case].

February 5, 1968, (February Session, 1968) cause came on to be heard before Haynsworth, Chief Judge, and Sobe-

loff, Boreman, Bryan, Winter, Craven and Butzner, Circuit Judges, sitting en banc, and was reargued by counsel and submitted.

June 20, 1968, opinion[s] filed.

June 20, 1968, judgment[s] of District Court reversed and cause remanded. Judgment[s] filed.

July 12, 1968, order[s] staying mandate pending certiorari filed. Joint with Nos. 10,060, 10,298 and 10,299.

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COMPENSATION ORDER OF DEPUTY COMMISSIONER JOHN P. TRAYNOR, FILED AT BALTIMORE, MARYLAND, JUNE 8, 1964.

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[R. Vol. I, pp. 29-32.]

U. S. Department of Labor  
Bureau of Employees' Compensation  
Fourth Compensation District

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Case No. 1236-1270

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*In the Matter of the Claim for Compensation under the  
Longshoremen's and Harbor Workers'  
Compensation Act.*

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William H. Johnson,

Claimant,

v.

Nacirema Operating Co., Inc.,

Employer,

The Travelers Insurance Co.,

Insurance Carrier.

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Such investigation in respect to the above entitled claim having been made as is considered necessary, and a hear-

ing having been duly held in accordance with law, and supplemental legal briefs having been submitted by both parties as an addendum to legal briefs submitted at the hearing, the Deputy Commissioner makes the following:

### FINDINGS OF FACT

That on the 14th day of November 1963 the claimant above named was in the employ of the employer above named at Baltimore, in the State of Maryland, in the Fourth Compensation District established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under the said Act was insured by The Travelers Insurance Co.; that the employer herein on the date of injury had other employees engaged in maritime employment; that on said day the claimant herein was employed by the employer herein, and was while performing such employment assigned to and stationed in a gondola type railroad car, where he was engaged in hooking up approximately ten ton drafts of steel beams, which drafts were being hoisted from the gondola type railroad car by means of a ship's crane, which crane was located on the vessel SS "Bethtex", which vessel was afloat in the Patapsco River at Sparrows Point, Maryland; that while thus engaged in hooking up drafts of steel a draft of steel claimant had hooked up swung back while it was being hoisted by the ship's crane and struck the claimant, pinning him against side of gondola car; that as a result of being struck by the draft of steel and being pinned against the gondola the claimant sustained serious injury resulting in his disability; that the pier on which the injury took place is a structure permanently affixed to the land at its northernmost end; that the surface of the pier extends over the waters of the Patapsco River in a southerly direction; that the pier is approximately six hundred feet long; that the pier's surface itself consists of three sets of railroad tracks on each side, which are extensions of track originating in the railroad shifting yard of the adjacent Bethlehem Steel properties; that there is a fifty foot center strip on the pier's surface,

which is covered by steel plating; that the pier due to its affixation and connection to the land is an extension of the land; that the vessel SS "Bethtex" at the time of the injury was docked stern in on the east side of the pier; that the gondola car in which claimant was working at the time of his injury was situated parallel to and alongside the vessel; that the gondola car was sixty feet in length, ten feet in width and nine feet in height; that written notice of injury was not given to the employer within thirty days, but that the employer had knowledge of the injury and has not been prejudiced by failure to receive such written notice; that the employer furnished the claimant with medical treatment, etc., in accordance with Section 7(a) of said Act; that the incident of 14 November 1963 had its inception and culmination on the surface of the pier; that the surface of the pier is situated over the navigable waters known as the Patapsco River; that the incident of 14 November 1963 does not constitute "an injury occurring upon the navigable waters of the United States including any dry dock" (Section 3(a));

Upon the foregoing findings of fact it is ordered by the Deputy Commissioner that the claim for compensation benefits be, and it hereby is rejected for the following reasons: that the claimant's employment on 14 November 1963 was not upon the navigable waters of the United States (including any dry dock), nor did the injury that he sustained on that date occur upon the navigable waters of the United States (including any dry dock).

Given under my hand and filed at Baltimore, Maryland, this 8th day of June 1964.

JOHN P. TRAYNOR,

Deputy Commissioner,

Fourth Compensation District.

COMPENSATION ORDER OF DEPUTY COMMISSIONER JOHN P.  
TRAYNOR, FILED AT BALTIMORE, MARYLAND, JUNE 8, 1964.

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[R. Vol. I, pp. 36-39.]

U. S. Department of Labor  
Bureau of Employees' Compensation  
Fourth Compensation District

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Case No. 1236-1269

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*In the Matter of the Claim for Compensation under the  
Longshoremen's and Harbor Workers'  
Compensation Act.*

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*Julia T. Klosek, widow of Joseph J. Klosek,  
deceased employee,* *Claimant,*

*v.*

*Nacirema Operating Co., Inc.,* *Employer,*  
*The Travelers Insurance Co.,*  
*Insurance Carrier.*

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Such investigation in respect to the above entitled claim having been made as is considered necessary, and a hearing having been duly held in accordance with law, and supplemental legal briefs having been submitted by both parties as an addendum to legal briefs submitted at the hearing, the Deputy Commissioner makes the following:

#### FINDINGS OF FACT

That on the 14th day of November 1963 the decedent employee above named was in the employ of the employer above named at Baltimore, in the State of Maryland, in the Fourth Compensation District established under the



provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under the said Act was insured by The Travelers Insurance Co.; that the employer herein on the date of injury had other employees engaged in maritime employment; that on said day the decedent herein was employed by the employer herein, and was while performing such employment assigned to and stationed in a gondola type railroad car, where he was engaged in hooking up approximately ten ton drafts of steel beams, which drafts were being hoisted from the gondola type railroad car by means of a ship's crane, which crane was located on the vessel SS "Bethtex", which vessel was afloat in the Patapsco River at Sparrows Point, Maryland; that while thus engaged in hooking up drafts of steel a draft of steel decedent had hooked up swung back while it was being hoisted by the ship's crane and struck decedent and propelled him head first out of the gondola car onto the pier; that as a result of the injury sustained through being struck by the draft of steel and being propelled onto the pier decedent expired on 14 November 1963, shortly after such injury; that the pier on which the fatal injury took place is a structure permanently affixed to the land at its northernmost end; that the surface of the pier extends over the waters of the Patapsco River in a southerly direction; that the pier is approximately six hundred feet long; that the pier's surface itself consists of three sets of railroad tracks on each side, which are extensions of track originating in the railroad shifting yard of the adjacent Bethlehem Steel properties; that there is a fifty foot center strip on the pier's surface, which is covered by steel plating; that the pier due to its affixation and connection to the land is an extension of the land; that the vessel SS "Bethtex" at the time of the injury was docked stern in on the east side of the pier; that the gondola car in which decedent was working at the time of his fatal injury was situated parallel to and alongside the vessel; that the gondola car was sixty feet in length, ten feet in width and nine feet in height; that written notice of injury and death was not given to the employer within thirty days, but that the employer had knowledge of the injury and death and has not been preju-

diced by failure to receive such written notice; that the employer furnished the deceased with medical treatment, etc., in accordance with Section 7(a) of the said Act; that Julia T. Klosek, born 7 October 1914 and married to the deceased on 10 November 1940, is the surviving wife of the deceased; that the decedent's widow, Julia T. Klosek, filed timely claim against the employer for death benefits under the Longshoremen's and Harbor Workers' Compensation Act on her own behalf and on behalf of the three minor children of the decedent herein; that Victor Henry, born 31 March 1947, Rose Veronica, born 11 March 1950, and Judy Ann, born 30 July 1955, are the minor children of the claimant; that the incident of 14 November 1963 had its inception and culmination on the surface of the pier; that the surface of the pier is situated over the navigable waters known as the Patapsco River; that the incident of 14 November 1963 does not constitute "an injury occurring upon the navigable waters of the United States including any dry dock" (Section 3(a));

Upon the foregoing findings of fact it is ordered by the Deputy Commissioner that the claim for death benefits be, and it hereby is rejected for the following reasons: that the decedent's employment on 14 November 1963 was not upon the navigable waters of the United States (including any dry dock), nor did the injury that he sustained on that date occur upon the navigable waters of the United States (including any dry dock).

Given under my hand and filed at Baltimore, Maryland, this 8th day of June 1964.

JOHN P. TRAYNOR,  
Deputy Commissioner,  
Fourth Compensation District.

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EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS BEFORE THE  
DEPUTY COMMISSIONER, DECEMBER 29, 1964

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[R. Vol. II, pp. 24, 25]

(Mr. Rabinowitz) I would call Mr. George Bailey as my first witness.

(Mr. Eley) Mr. Commissioner, we could stipulate to a great deal of this testimony.

I don't think the facts are essentially in dispute about where the accident happened, or gears.

(Off the record.)

(The Commissioner) Let the record show [Vol. II, p. 25] we went off the record so parties could stipulate as to the facts of the injury.

(Mr. Rabinowitz) Mr. Eley and I have stipulated the facts to be as follows: that the Claimant, Mr. Avery, was in a railroad car on Pier B on December 28, 1961, a ship was beside Pier B, logs were being loaded onto the ship from the railroad car, that while a log was being lifted from the railroad car by means of the ship's gear, that Claimant was struck by a log or logs while the log or logs were attached to the ship's gear, and he was crushed against the side of the railroad car, the railroad car was on the pier itself, and the pier itself was over the water, but the end of the pier was attached to the land.

(Mr. Eley) So stipulated.

(Mr. Benson) So stipulated.

(The Commissioner) That takes care of the facts of the injury.

\* \* \* \*

[Vol. II, pp. 26, 27]

(The Commissioner) Well, it is a regular pier then. I understand it is over the waters?

(Mr. Benson) Right.

(The Commissioner) And it extends into the Elizabeth River for some distance?

(Mr. Rabinowitz) Yes, sir.

(Mr. Benson) As much as 2 ships can berth, say 1000 feet for the union's side, 2 ships can berth at either of those [Vol. II, p. 27] piers extending into the Elizabeth River.

Those ships usually are from 500 to 600 feet long, and that makes the distance extending around from 1000 to 1200 feet in the navigable waters of the Elizabeth River.

\* \* \* \*

[Vol. II, p. 27]

(The Commissioner) We are getting quite a bit of information. I don't know that all is factual, but I think we have sufficient information to show that the pier extends over navigable waters.

(Mr. Eley) We will stipulate to that part.

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COMPENSATION ORDER OF DEPUTY COMMISSIONER JERRY C. OOSTING, FILED AT NORFOLK, VIRGINIA, FEBRUARY 10, 1965.

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[R. Vol. II, pp. 6-9.]

United States Department of Labor  
Bureau of Employees' Compensation  
Fifth Compensation District

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Case No. 2-2831

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*In the matter of the claim for compensation under the  
Longshoremen's and Harbor Workers'  
Compensation Act.*

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Albert Avery,

Claimant,

v.

Old Dominion Stevedoring Corporation,  
Employer,

Liberty Mutual Insurance Company,  
Insurance Carrier.

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Such investigation in respect to the above entitled claim having been made as is considered necessary, and a hear-

ing having been duly held in conformity with law, the Deputy Commissioner makes the following

#### FINDINGS OF FACT

That on the 28th day of December 1961 the claimant above named was in the employ of the employer above named at Norfolk, in the State of Virginia, in the Fifth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by the Liberty Mutual Insurance Company; that on said day the claimant was employed as a longshoreman for the employer and assigned with other members of the work gang to an open type railroad car where they were engaged in hooking up logs, such logs being hoisted from the railroad car by means of ship's gear and loaded onto the ship, which vessel was afloat in the Elizabeth River, Norfolk, Virginia; that while a log was being lifted from the railroad car by means of the ship's gear, the claimant was struck by a log or logs while the log or logs were attached to the ship's gear crushing him against the side of the railroad car, resulting in fracture of transverse processes of lumbar vertebrae and internal injuries; that the railroad car on which the injury was sustained was on Pier B, City Piers; that the pier is the traditional or usual type structure existing in the Norfolk area; that the pier is attached to the land at one end and it juts outward and over the waters of the Elizabeth River; that the injury had its inception and culmination on the railroad car which was on the surface of the pier; that the pier due to its connection to the land is an extension of the land; that written notice of injury was not given within thirty days but that the employer had knowledge of the injury and has not been prejudiced by failure to receive such written notice; that the employer furnished the claimant with medical treatment, etc., in accordance with Section 7(a) of the Act; that the average weekly wage of the claimant at the time of his injury was \$68.07; that the accident of 28 December 1961 does not constitute an injury occurring upon the navigable waters of the United States (including any dry dock) and is excluded

under the provisions of Section 3(a) of the Act; that the Industrial Commission of Virginia, pursuant to the terms of the Workmen's Compensation Law of Virginia, awarded compensation to the claimant at the rate of \$32.40 per week for the period from 28 December 1961 to 12 July 1962.

Upon the foregoing findings of fact it is ordered by the Deputy Commissioner that the claim be and it is hereby **REJECTED** for the reason that the injury sustained by the claimant on 28 December 1961 did not occur upon the navigable waters of the United States (including any dry dock) within the meaning of the Longshoremen's and Harbor Workers' Compensation Act.

Given under my hand and filed at Norfolk, Virginia this 10th day of February 1965.

JERRY C. OOSTING,  
Deputy Commissioner,  
Fifth Compensation District.

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OPINION OF UNITED STATES DISTRICT COURT FOR THE DISTRICT  
OF MARYLAND, FILED AND ENTERED JUNE 22, 1965, RE-  
PORTED AT 243 F. SUPP. 184, 1965 A.M.C. 1825.

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[R. Vol. I, pp. 146-175]

In the United States District Court for the  
District of Maryland

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Admiralty No. 4704

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William H. Johnson

v.

John P. Traynor, Deputy Commissioner,  
United States Department of Labor

and

Nacirema Operating Company, Inc.,  
a body corporate.



Admiralty No. 4705

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*Julia T. Klosek, widow of Joseph J. Klosek,  
deceased employee*

*v.*

*John P. Traynor, Deputy Commissioner,  
United States Department of Labor*

*and*

*Nacirema Operating Company, Inc.,  
a body corporate.*

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(Filed: June 22, 1965.)

John J. O'Connor, Jr., O'Connor and Preston, Baltimore, Maryland, for complainants.

Randall C. Coleman and Thomas W. Jamison, III, Baltimore, Maryland, for respondent Nacirema Operating Company, Inc.; Thomas J. Kenney, United States Attorney and Joseph H. H. Kaplan, Baltimore, Maryland, for Deputy Commissioner.

R. DORSEY WATKINS, District Judge:

These companion proceedings were brought by William H. Johnson, injured longshoreman, and Julia T. Klosek, widow of Joseph J. Klosek, deceased longshoreman, pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A., section 901 et seq. (the Longshoremen's Act) to review and set aside, as not in accordance with law, compensation orders filed by John P. Traynor, Deputy Commissioner, United States Department of Labor, denying compensation benefits under the act to the claimants. The factual background giving rise to each claim is identical, the same legal question is presented as to each claim and counsel for the respective parties are the same in each case. Accordingly, the Deputy Commissioner held a combined hearing on both claims and

in this court likewise the proceedings for review in both cases have been combined.

The facts as found by the Deputy Commissioner are not in dispute. On November 14, 1963 Johnson and Klosek, longshoremen and employees of the Nacirema Operating Company, Inc., were engaged in loading the S.S. Bethtex, a vessel afloat in the navigable waters of the Patapsco River at Sparrows Point, Maryland. Both men were assigned to and stationed in a gondola type railroad car which was sixty feet in length, ten feet in width and nine feet in height and was positioned on railroad tracks on the High Pier at the Bethlehem Steel Plant at Sparrows Point. The longshoremen were engaged in hooking up approximately ten ton drafts of steel beams which were then hoisted from the railroad car by use of a crane located on the S.S. Bethtex. One such draft while being lifted into a hold of the vessel swung back, struck Klosek and propelled him head first out of the gondola onto the pier, fatally injuring him. Johnson was pinned by the same draft against the side of the gondola car and suffered serious injuries. The pier on which the accident took place is permanently affixed to the land at its northernmost end. Its surface extends over the waters of the Patapsco River in a southerly direction. The pier is approximately six hundred feet long and its surface consists of three sets of railroad tracks on each side, which tracks are extensions of tracks originating in the railroad shifting yard of the adjacent Bethlehem Steel properties. There is a fifty foot center strip on the pier which is covered by steel plating. At the time of the injury the "S.S. Bethtex" was docked stern in on the east side of the pier. The gondola car in which the decedent and injured claimant were working was situated parallel to and alongside the vessel on the third railroad track.

Claims were filed on behalf of both claimants under the Maryland Workmen's Compensation Act. (Article 101, section 1 et seq., Annotated Code of Public General Laws of Maryland, 1957 Edition.) Johnson has been paid in accordance with the Maryland State Workmen's Compensation

tion Act schedule and although Mrs. Klosek has apparently not as yet received any benefits, her claim has not been contested by Nacirema Operating Company or its insurance carrier and the court is advised that it is anticipated that compensation will be forthcoming under the Maryland Act.

In addition Johnson and Mrs. Klosek submitted timely claims against Nacirema Operating Company under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. 901 et seq.; he for temporary and permanent disability and she for death benefits. Answers were filed on behalf of the employer and insurance carrier raising, among other defenses, lack of jurisdiction over the subject matter of the compensation claims. The hearing before the Deputy Commissioner was limited to the question of jurisdiction and it is the sole issue before this court. The Deputy Commissioner rejected both claims for compensation on the ground that the disability of Johnson and the death of Klosek did not result "from an injury occurring upon the navigable waters of the United States (including any dry dock)", emphasis supplied, as that jurisdictional prerequisite for the applicability of, and for coverage under, the provisions of the Longshoremen's and Harbor Workers' Compensation Act has been interpreted by the courts.

Section 903(a) of Title 33, U.S.C.A., entitled "Coverage" provides, in pertinent part:

"(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law."

Claimants urge two grounds for finding them within the coverage of the Act:

(1) That in simple fact both wharves and ships are upon the water and that accordingly there should be no differ-

ence in the result as to coverage between injuries occurring on a wharf or pier over and upon navigable waters and injuries occurring on a deck of a vessel over and upon navigable waters and (2) that in any event the Extension of Admiralty Jurisdiction Act of 1948 (46 U.S.C.A. 740) by embracing within the admiralty and maritime jurisdiction of the United States Courts certain shoreside injuries has likewise extended the coverage of the Longshoremen's and Harbor Workers' Compensation Act to injuries occurring on land. The court will consider these two contentions in turn.

(1) It has been uniformly held that structures such as wharves, piers, etc., affixed permanently to shore and bed, are extensions of land, remedies for injuries upon which are restricted to those afforded by local rather than admiralty law. (*Swanson v. Marra Brothers*, 1946, 328 U.S. 1, 66 S. Ct. 869, 90 L. Ed. 1045; *State Industrial Commission v. Nordenholt Corp.*, 1922, 259 U.S. 263, 42 S. Ct. 473, 66 L. Ed. 933; *American Export Lines, Inc. v. Revel*, 4 Cir. 1959, 266 F. 2d 82, 84; see also: *Hastings v. Mann*, 4 Cir. 1965, 340 F. 2d 910, 911-912; *Benedict on Admiralty*, section 29, page 64, 6th Edition; *Gilmore & Black, The Law of Admiralty*, section 6-46, page 339, 1957 Edition; and *Robinson on Admiralty*, section 11, page 81, 1939 Edition.) In the *Nordenholt* case, decided prior to the enactment of the Longshoremen's Act, the Supreme Court of the United States clearly held that an injury incurred by a longshoreman who, while engaged in unloading a vessel lying in navigable waters, slipped and fell on the "dock"<sup>1</sup> was a land injury and, therefore, that recovery for such an injury was governed by the local state workmen's compensation act and not by general maritime law. After the enactment of the Longshoremen's Act the Supreme Court of the

<sup>1</sup> Webster's Third New International Dictionary, Unabridged, recognizes that the meaning of the word "dock" is not restricted to "a waterway extending between two piers or projecting wharves or cut into land for the reception of ships" (4 dock 1 C) but may also properly be used to describe a structure built on pilings such as a wharf or pier (4 dock 2 A), the word being used in the latter sense in the *Nordenholt* case.

United States reaffirmed the principle set out in the *Nordenholt* case and adhered to it without deviation in the *Swanson* case. *Swanson*, a longshoreman, while on a pier and while engaged in loading cargo on a vessel lying alongside, was injured when a life raft fell from the vessel and struck him. The specific question before the court was whether or not the longshoreman had a right of action against his employer, a stevedoring company, under the Jones Act while working on shore. The court clearly treated the stevedore's injury as a land injury and in interpreting the inter-relationship of the Longshoremen's Act and the Jones Act stated:

"We must take it that the effect of these provisions of the Longshoremen's Act is to confine the benefits of the Jones Act to the members of the crew of a vessel plying in navigable waters and to substitute for the right of recovery recognized by the *Haverty* case<sup>2</sup> only such rights to compensation as are given by the *Longshoremen's Act*. But since this act is restricted to compensation for injuries occurring on navigable waters, it *excludes* from its own terms and from the Jones Act *any remedies* against the employer for *injuries inflicted on shore*. The Act leaves the injured employees in such cases to pursue the remedies afforded by the local law, which this Court has often held permits recovery against the employer for injuries inflicted by land torts on his employees who are not members of the crew of a vessel." (*Swanson v. Marra Bros.*, 1946, 328 U.S. 1, 7, emphasis supplied.)

Eleven years after the enactment of the Extension of Admiralty Jurisdiction Act of 1948, the United States Court

<sup>2</sup> In *International Stevedoring Company v. Haverty*, 1926, 272 U.S. 50, 47 S. Ct. 19, 171 L. Ed. 157, a longshoreman, who was injured while stowing cargo and while on but not employed by a vessel lying in navigable waters, was allowed to bring suit under the Jones Act against his stevedore company employer to recover for injuries allegedly caused by the employer's negligence. This decision was, of course, rendered prior to the enactment of the Longshoremen's Act, which now provides the "exclusive" right of recovery of the longshoreman against his employer.

of Appeals for the Fourth Circuit clearly and unmistakably stated in the Revel case that the Nordenholt-Swanson principle was still the law. Revel, a stevedore, was working on the pier alongside a hold preparing cargo to be hoisted onto the vessel and stowed in the hold. A pallet load of drums, part of the cargo being hoisted, fell onto the pier injuring him. He thereafter received and accepted compensation in accordance with the local state workmen's compensation act. Subsequently, he brought suit, to recover damages for his personal injuries, against the owner of the vessel which he had been helping to load at the time of the accident. On appeal, in analyzing the injured longshoreman's right of recovery as against his stevedoring company employer the United States Court of Appeals for the Fourth Circuit said:

"Since Revel was injured while standing on the dock (an extension of the land), his remedies are restricted to those afforded by the local law. *Swanson v. Marra Bros.*, 1946, 328 U.S. 1, 66 S. Ct. 869, 90 L. Ed. 1045; *State Industrial Comm. v. Nordenholt Corp.*, 1922, 259 U.S. 263, 42 S. Ct. 473, 66 L. Ed. 933; . . ." (*American Export Lines, Inc. v. Revel*, 4 Cir. 1959, 226 F. 2d 82, 84.)

In contrast to the myriad of cases holding that wharves, pilings, piers and like structures are extensions of land,<sup>3</sup> not one case has been cited by the claimants holding, or even suggesting, that a pier or similar structure could be considered not as being an extension of land but rather as being upon navigable waters. Accordingly, this court holds

<sup>3</sup> See in addition to those previously cited: *Cleveland Terminal Railroad Company v. Cleveland Steamship Company*, 1908, 208 U.S. 316, 28 S. Ct. 414, 52 L. Ed. 508; *Smith & Son v. Taylor*, 1928, 276 U.S. 179, 48 S. Ct. 228, 72 L. Ed. 520; *Johnson v. Marshall*, 9 Cir. 1942, 128 F. 2d 13, cert. den. 1942, 317 U.S. 629, 63 S. Ct. 44, 87 L. Ed. 508; *Kent v. Shell Oil Co.*, 5 Cir. 1961, 286 F. 2d 746; *Connor v. United States, et al.*, D.C. E.D. Pa. 1949, 87 F. Supp. 847; and the recent cases of *Gutierrez v. Waterman Steamship Corp.*, 1963, 373 U.S. 206, 83 S. Ct. 1185, 10 L. Ed. 2d 297; *Hagans v. Ellerman and Bucknall Steamship Company*, 3 Cir. 1963, 318 F. 2d 563, 582.



that the High Pier at the Bethlehem Steel Plant at Sparrows Point is an extension of land and that the death and injury occurring thereon did not occur "upon the navigable waters of the United States."

(2) The claimants thus fall back on their argument that the Extension of Admiralty Jurisdiction Act of 1948, 46 U.S.C.A., section 470, by embracing within the admiralty and maritime jurisdiction of the United States certain shoreside injuries, in effect amended the coverage provision of the Longshoremen's and Harbor Workers' Compensation Act and extended coverage under the latter act to certain types of land injuries. For claimants to prevail an amendment must be shown because it is clear that, when the Longshoremen's Act was initially passed in 1927, Congress did not intend to extend coverage to land injuries although it had been urged to. One writer stated the problem in 1926 as follows:

"The fact that admiralty has never assumed jurisdiction over longshoremen while on the dock (*Nordenholt* case) indicates definitely that, so far as the courts are concerned, the work of loading and unloading vessels will continue to be a divided process as regards work on and off the vessel, unless legislation intervenes. \* \* \* the only inclusive method remaining is for Congress to assume jurisdiction over the entire subject, either as elements in the performance of maritime contracts or by virtue of its power under the commerce clause of the Constitution." (Clark, "The Longshoreman and Accident Compensation", 22 Monthly Labor Review (April 1926), pages 5 and 18.)

Much of the testimony before the Senate urged that the coverage provisions of the bill extend to land injuries as well as injuries upon navigable waters. Mr. William F. Dempsey, representing the International Longshoremen's Association, declared that the bill should be drafted to cover a longshoreman even were he injured on the dock:

"If he is working in maritime employment it is the same whether on the docks or on board ship, because

the cargo has to be assembled on the dock and handled there in order to go on board ship." (Senate Hearings, pages 26 to 27.)

Mr. Lindley D. Clark, for the Bureau of Labor Statistics, pointed out that Congress in enacting this legislation could rely for its authority not only upon the admiralty and maritime power but also upon the commerce clause of the Constitution:

"There is control of the whole contract of loading, unloading, work on the dock, on the bridge, and on the ship, and it is the earnest desire of Commissioner Stewart that a bill should cover the contract, cover the job and not simply the man when he is on the ship." (Senate Hearings, page 40.)

The "earnest desire" of the Commissioner was not realized. The act as finally passed blended the two traditional bases of admiralty jurisdiction, contract (the existence of the employment relationship) and tort (the situs of the injury), and as to this latter element, the only one at issue in the instant proceedings, adopted the familiar admiralty rule for jurisdiction over torts — occurrence upon navigable waters. The line had to be, and has to be, drawn somewhere. Congress drew it between the land and the navigable waters of the United States.<sup>4</sup> The legislative his-

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<sup>4</sup> Congress did not draw the line as some might argue, as the ludicrous result of using the situs of injury test for coverage, between the thin longshoreman and the fat longshoreman. At the time of the Senate hearings, prior to the enactment of the Longshoremen's Act, an attorney for various interested labor organizations while testifying generally in support of the bill and as to its need noted that if a longshoreman fell while going between the ship and the wharf and hit the wharf, he would be covered under local law, but if he fell between the ship and the wharf he would be denied state compensation and no federal compensation as yet existed. He used as an illustration of the complexities and sometimes the absurdities of jurisdictional problems the case of the fat longshoreman who, in falling, hit both the wharf and the ship (Senate Hearings, pages 29-30). Lines are often difficult to draw but in the enactment of legislation the duty, and indeed the sole authority, to draw the line is that of Congress.

tory of the act clearly shows this to be the case. S. Rep. No. 973, 69th Cong., 1st Sess., at page 16 states:

"The purpose of this bill is to provide for compensation, in the stead of liability, for a class of employees commonly known as 'longshoremen.' These men are mainly employed in loading, unloading, refitting, and repairing ships; but it should be remarked that *injuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship so as to bring them within the maritime jurisdiction of the United States.*" (emphasis supplied.)

Coverage of injuries occurring on the wharf was advertently omitted. Thus, there is no question but that at least until the enactment of the Extension of Admiralty Jurisdiction Act of 1948, 46 U.S.C.A., section 740, the Longshoremen's Act was "restricted to compensation for injuries occurring on navigable waters", "exclude[d] from its own terms \* \* \* any remedies against the employer for injuries inflicted on shore", and left "the injured employees in such cases to pursue the remedies afforded by the local law \* \* \*." (Swanson v. Marra Brothers, Inc., 1946, 328 U.S. 1, 7, 66 S. Ct. 869, 90 L. Ed. 1045.)

The Extension of Admiralty Jurisdiction Act of 1948, enacted two years after the Swanson decision, provides in part:

"The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."

Certainly the Extension Act does not strike down the distinction previously made by the courts between land injuries and water injuries. Indeed the act expressly recognizes the existence of land injuries as distinguished from injuries occurring on navigable water. But claimants would have this court equate the jurisdictional requirement of the Longshoremen's Act of the occurrence of the injury "upon

the navigable waters" with occurrence of the injury within the "admiralty jurisdiction" of the United States as that jurisdiction is spelled out in the Extension of Admiralty Jurisdiction Act above and thus extend coverage of the compensation act to certain shoreside injuries not therefore covered.<sup>5</sup> The Extension Act cannot be so construed. First, it is significant that in enacting the Longshoremen's Act Congress specifically chose the phrase "navigable waters" in preference to the phrase "admiralty jurisdiction". As originally introduced, the Longshoremen's Act contained a provision covering "any employment performed on a place *within the admiralty jurisdiction* of the United States, except employment of local concern and of no direct relation to navigation and commerce". (Hearings on S. 3170, Senate Judiciary Committee, 69th Cong., 1st Sess., page 2; emphasis supplied.) After much discussion over the advisability of the "local concern" exception, this exception was omitted and the phrase "navigable waters" substituted for the reference to admiralty jurisdiction. Had Congress considered the two phrases identical there would have been no need for the substitution of one for the other. "The exclusion of on-shore injuries to maritime employees otherwise within the Act may have reflected doubts as to Congressional power, in a statute passed under the Constitutional grant of admiralty jurisdiction, to go beyond the highwater mark, or it may have been a policy decision to leave as much as possible to the state compensation com-

<sup>5</sup> Again with reference to the possible inequities arising in the case of the thin longshoreman, possibly covered only by the monetarily less advantageous provisions of a state workmen's compensation act, as distinguished from the fat longshoreman, having recourse to either state or federal coverage, it should be noted that even were the court, in an effort to cure such inequities, seize upon the Extension Act as a means of extending the coverage of the Longshoremen's Act, a longshoreman who while engaged in the loading or unloading of a vessel suffered injuries on a pier would not be entitled to compensation under the Federal Act unless the court could also spell out that his injury was, in some manner, "caused by a vessel on navigable water." The complete coverage urged by those seeking provisions covering "the contract, cover[ing] the job and not simply the man when he is on the ship" would still not be effectuated.

missions." (Gilmore & Black, *The Law of Admiralty*, page 339, 1957 Edition.)

Secondly, the Extension Act is certainly not an express amendment of the Longshoremen's Act. It is completely silent as to the Longshoremen's Act. Similarly a contemporaneous amendment of the Longshoremen's Act contains no cross reference to the Extension Act. The Extension Act was enacted on June 19, 1948. On June 24, 1948 Congress enacted Public Law No. 757 (62 Stat. 602) — a bill to increase certain benefits payable under the Longshoremen's Act in view of the increase in wages and cost of living since the original passage of the Act in 1927. Nowhere in the legislative history of this amendment is there any reference to any possible extension of coverage under the Longshoremen's Act by the possible passage of the co-pending Extension Act. (1948 U.S. Code, Cong. Serv., Volume 2, pages 1979-1984.)

Thirdly, administrative interpretations of the Longshoremen's Act, while of course not controlling, are not without significance. The Bureau of Employees Compensation of the United States Department of Labor which has been charged with administering the Longshoremen's Act since it was passed, has consistently construed it as not applying to injuries occurring upon a wharf. Opinion No. 16, 1927 A.M.C. 1855. The court is advised that the Bureau still construes the Act as not covering injuries which occur wholly upon a wharf.

Fourthly, the Department of Justice which at one point urged that the Extension Act extended the coverage afforded by the Longshoremen's Act has now retreated from that position. In a recent case, *Michigan Mutual Liability Company v. Arrien*, D.C. S.D. N.Y. 1964, 233 F. Supp. 496, the brief submitted in the District Court by the Department of Justice on behalf of the Deputy Commissioner raised the issue of the impact of the Extension Act upon the coverage of the Longshoremen's Act. The District Court accepted the approach urged by the government and found an implication in the enactment of the Extension Act that the coverage of the Longshoremen's Act had been

expanded to embrace certain shoreside injuries. The case was appealed. The holding of the United States Court of Appeals for the Second Circuit will be discussed, *infra*, at page 29, footnote 7. In the appellate brief submitted by the Department of Justice on behalf of the Deputy Commissioner of the Second Compensation District, the government has taken the position that as the accident involved in that case occurred on a "skid", a removable wooden rectangular platform, approximately 6' by 10' which was attached to the wharf and extended over the navigable waters to the vessel it was an accident occurring upon the navigable waters of the United States and the Department of Justice has abandoned any reliance upon the argument made in the court below that the enactment of the Extension Act had by implication expanded the coverage of the Longshoremen's Act. In its brief submitted in the instant case, the Department of Justice notes that the Longshoremen's Act is not as far reaching "as the burgeoning maritime tort jurisdiction which has been extended shoreward by such laws as the Jones Act and the Extension Act" and, accordingly concludes that "whatever incursions onto the land may have been permitted by specific legislation or case law, any attempt in the instant case to conform artificially the phrase 'upon the navigable waters of the United States' to fit land injuries such as those with reference to piers, wharves, etc. would be to sanction judicial legislation. A new meaning would have to be given to the quoted phrase." (Memorandum submitted by the Department of Justice on behalf of respondent Deputy Commissioner, page 9.)

Fifthly, in House Report No. 2287, dated July 28, 1958, submitted some ten years after the enactment of the Extension of Admiralty Jurisdiction Act of 1948, the Congressional understanding that injuries upon wharves and other extensions of land are not within the coverage of the Longshoremen's Act was evidenced by the following comment:

"The Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424; 33 U.S.C. 901 et seq.), provides compensation for injuries suffered by long-



shoremen, ship repairmen, ship servicemen, and workers in related employment when they are working for private employers within the federal maritime jurisdiction *on the navigable waters of the United States*, including drydocks. *These employees are subject to the protection of State safety standards when performing work on docks and in other shore areas.*

\* \* \* \* \*

"The Longshoremen's and Harbor Workers' Compensation Act was passed in 1927 as a result of Supreme Court decisions holding that the States could not apply their workmen's compensation laws in an area which was exclusively maritime and that Congress could not lawfully delegate this authority. Amendments to improve the compensation features of the act and bring it up to date have been made in subsequent years. However, the act had never been amended to authorize the establishment of an effective safety program." (1958 U.S. Code, Cong. and Adm. News, Volume 2, pages 3844-3845; emphasis supplied.)

Thus, there is no indication in any of the legislative history pertaining to the Longshoremen's Act either before, at the time of, or after the passage of the Extension Act that the Extension Act was intended in any way to affect the scope of coverage of the Longshoremen's Act. The administrative interpretations by the Department of Labor of the Longshoremen's Act and the construction presently given that act by the Department of Justice do not support a conclusion that the Extension Act was meant to have any, or had any, impact upon the Longshoremen's Act. Even Judge Edmund L. Palmieri in *Michigan Mutual Liability Company v. Arrien*, D.C. S.D. N.Y. 1964, 233 F. Supp. 496, 501, although finding the Extension Act "illuminating" as to the proper construction to be given to the words "upon the navigable waters" as used in the Longshoremen's Act, noted that the Extension Act "was not an express amendment of the Longshoremen's Act." What claimants then in effect are asking this court to do, advancing arguments almost identical to those urged in 1927

upon Congress (and rejected by it) to the effect that the Longshoremen's Act "should cover the contract, cover the job and not simply the man when he is on the ship", is to hold that the Extension Act sub silentio by implication repealed in 1948 the coverage provisions of the Longshoremen's Act, twenty-one years after its original enactment, and re-enacted the coverage provisions with amendments so as to extend coverage to certain shoreside injuries not previously embraced within the Longshoremen's Act. To so hold would be but the grossest type of judicial legislation, an activity in which this court is not authorized to, and in any event declines to, engage.

The legislative history of the Extension Act itself makes it abundantly clear that Congress in drafting the Extension Act was merely extending the traditional admiralty jurisdiction to include damage occasioned by a vessel situated on navigable waters to person or property situated upon land, such causes of action theretofore having been maintainable only on the common law side. The bill did not attempt to, nor intend to, create new causes of action. House Report No. 1523 describes the effects of the bill as follows:

"Under existing law, admiralty and maritime jurisdiction in respect of claims arising out of maritime torts is extended by the United States courts to only those cases where injury is done upon navigable waters, and not to those where injury is done to persons or property situated upon land, even though the injury is caused by a vessel situated on navigable waters. For example, if a bridge or pier, or any person or property situated thereon, is injured by a vessel, the admiralty courts of the United States do not entertain the claim for the damages thus caused. *Cleveland Terminal & Valley R.R. Co. v. Cleveland S.S. Co.* (208 U.S. 316); *The Troy* (208 U.S. 321); *Martin v. West* (222 U.S. 191). The bill under consideration would provide for the exercise of admiralty and maritime jurisdiction in all cases of the type above indicated.

"As a result of the denial of admiralty jurisdiction in cases where injury is done on land, when a vessel

collides with a bridge through mutual fault and both are damaged, under existing law the owner of the bridge, being denied a remedy in admiralty, is barred by contributory negligence from any recovery in an action at law. But the owner of the vessel may by a suit in admiralty recover half damages from the bridge, contributory negligence operating merely to reduce the recovery. Further, where a collision between a vessel and a land structure is caused by the fault of a compulsory pilot, the owner of the land structure is without remedy for his injuries since at law a compulsory pilot is not deemed the servant of the vessel's master or owner. *Homer Ramsdell Transportation Co. v. Compagnie Generale Transatlantique* (182 U.S. 406, 416). But if the vessel sheers off the land structure to collide with another vessel in the vicinity, the owner of the second vessel, by an in rem proceeding in admiralty, may recover full damages, for the wrong is viewed as that of the vessel itself and compulsory pilotage is no defense. *The China* (74 U.S. 53, 68). The bill under consideration would correct these inequities as a result of providing that the admiralty courts shall take cognizance of all of them.

"The bill will bring United States practice respecting maritime brts into accord with that followed by the British, who by a series of statutes, beginning in 1840, have restored admiralty jurisdiction in situations of this character and brought the British law into harmony with that of most European countries.

\* \* \* \* \*

"Adoption of the bill will not create new causes of action." (1948 J.S. Code, Cong. Serv., Volume 2, pages 1899, 1900.)

The legislative history of the Extension Act does not suggest but rather strongly negates any intention on the part of Congress to repeal and then re-enact with amendments the coverage provisions of the Longshoremen's Act. As shown by this history quoted in part above, the Extension Act was passed to cure inequities arising when a vessel

on navigable waters caused damage or injury on land. This statement is made by the court with full awareness that the Supreme Court of the United States has found nothing in the legislative history of the Extension Act to require that the language of the statute itself be given too restrictive an interpretation. (*Gutierrez v. Waterman Steamship Corp.*, 1963, 373 U.S. 206, 83 S. Ct. 1185, 10 L. Ed. 2d 297.)

Turning next to the express wording of the Extension Act itself, it can be seen that the wording of that enactment is peculiarly inapplicable to a bill extending coverage under a workmen's compensation act. The Extension Act, Title 46, U.S.C.A., section 740, provides:

"The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."

Most significantly, the statute then continues:

"In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable waters."

What then has Congress said? To paraphrase the second paragraph of the statute quoted above — in any case where the admiralty jurisdiction of the United States has been extended to a land injury to person or *property*, suit to recover damages may be brought in rem or in personam according to the principles of law and rules of practice applicable if the injury or damage had occurred on navigable waters. Damage to property is never the subject matter of a workmen's compensation act. A proceeding before the Deputy Commission under the Longshoremen's Act is not a suit. A suit is not brought but rather the Act provides for a claim to be filed. The proceeding is not one in rem or in personam. It is an administrative pro-

ceeding commenced with the filing of a claim with an administrative officer, it is conducted in accordance with administrative principles and rules and it terminates not in a judgment enforceable in rem or in personam but terminates with the rendering of an administrative order rejecting the claim or making an award. The Extension Act clearly contemplates the extension of admiralty jurisdiction over a suit based on tort liability to recover damages. The Longshoremen's Act on the contrary sets up an administrative proceeding to obtain compensation without regard to tortious conduct, and with no provision for reduction of "damages" for contributory or comparative negligence. The two statutes do not deal with the same subject matter, are inherently inconsistent with each other, and cannot be read as being in *pari materia*. The court finds nothing within the four corners of the Extension Act itself to indicate any Congressional intent to amend the jurisdictional test of the occurrence of an injury upon the navigable waters of the United States as that requirement specifically appears within the coverage provisions of the Longshoremen's Act. Indeed the wording of the Extension Act is peculiarly inapplicable to any situation involving an injury to be compensated for by way of a workmen's compensation act.

The decisions rendered since the enactment of the Extension Act merit discussion but lead to no different conclusion. Cases, upon which claimants rely, pertaining to Jones Act (46 U.S.C.A., section 688) liability are not in point for the responsibility of the employer to his seaman-employee thereunder is not circumscribed by any jurisdictional requirement that the situs of the injury be upon the water. The sole jurisdictional requirement is injury in the course of a seaman's employment. Similarly, cases of unseaworthiness liability for land injuries are inapposite for as succinctly pointed out by the Supreme Court of the United States in *Gutierrez v. Waterman Steamship Corp.*, 1963, 373 U.S. 206, 214, 83 S. Ct. 1185, 10 L. Ed. 2d 297, allowing recovery to a longshoreman against a vessel for injuries incurred on land and caused by the ship's unseaworthiness, "the tort of unseaworthiness arises out of a

maritime status or relation and is therefore 'cognizable by the maritime [substantive] law whether it arises on sea or on land' [Strika v. Netherlands Ministry of Traffic, 2 Cir. 1950, 185 F. 2d 555, 558]." Since the cause of action in unseaworthiness arises under the general maritime law and not under a specific enactment such as the Longshoremen's Act, the general admiralty and maritime jurisdictional provisions are controlling and the Extension Act accordingly comes into play. Finally, cases concerned with a seaman's maintenance and cure should be distinguished from cases arising under the Longshoremen's Act, for liability for the care of a seaman is independent of the situs of the injury and is instead a liability depending upon and arising out of the contractual relationship between the parties.

Aside from these totally inapplicable cases, claimants urge upon the court that the following broad and general language appearing in *Calbeck v. Travelers Insurance Co.*, 1962, 370 U.S. 114, 124, 82 S. Ct. 1196, 8 L. Ed. 2d 368, indicates that the coverage of the Longshoremen's Act may, and indeed must, be extended by judicial interpretation to land injuries:

"In sum, it appears that the Longshoremen's Act was designed to ensure that a compensation remedy existed for all injuries *sustained* by employees *on navigable waters*, and to avoid uncertainty as to the source, state or federal, of that remedy. Section 3(a) should, then, be construed to achieve these purposes. Plainly, the Court of Appeals' interpretation, fixing the boundaries of federal coverage where the outer limits of state competence had been left by the pre-1927 constitutional decisions, does not achieve them." (Emphasis supplied.)

No support for claimants' position may be found in this excerpt and, indeed, the case as a whole is squarely against claimants. First, the quotation above contains the specific jurisdictional language "on navigable waters". Secondly, the term "on navigable waters" as the *sine qua non* of

jurisdiction is used in the opinion at least eleven times.<sup>6</sup> Thirdly, it should be noted that under the facts of the Calbeck case the injuries indisputably occurred on navigable waters. The sole issue before the court was whether or not a court-made distinction (having been made prior to the passage of the Longshoremen's Act) that state compensation statutes could constitutionally be applied to employees engaged in the completion of a launched vessel under construction on navigable waters but could not constitutionally be applied to employees engaged in repair work on completed vessels on navigable waters was still valid after passage of the act so as to exempt from federal coverage employees engaged in construction as distinguished from repair work. The Supreme Court held that such judge-made law was not in accord with the intent evidenced by Congress's enactment of the Longshoremen's Act to extend coverage to all injuries sustained on navigable waters. The Supreme Court did not say that by judicial legislation the courts may amend the express jurisdictional requirements of the Longshoremen's Act.

There have been several cases in which the question of the effect of the Extension Act upon the Longshoremen's Act has been raised. In *Gladden v. Stockard Steamship Company*, 3 Cir. 1950, 184 F. 2d 510, the court took the position that it was not necessary for it to consider and rule upon the issue, stating that the result as far as the plaintiff was concerned would be the same were the tort considered a maritime tort or a terrestrial tort as the plaintiff's action against the decedent's employer would be barred by the "exclusive" remedy provision of the Longshoremen's Act were the tort maritime or by the "exclusive" remedy provision of the state workmen's compensation act were it a terrestrial tort. In *Interlake Steamship Company v. Nielsen*, 6 Cir. 1964, 338 F. 2d 879, 882, the court, recognizing that the Extension Act "obviously was not designed directly to affect the Longshoremen's and Harbor Workers' Compensation Act", felt that the Extension

<sup>6</sup> See pages: 115, 116 (twice), 117, 119, 120, 124, 125, 126, 129 (twice).



sion Act and the trend of case law "all pointed in the direction of expanding the boundaries of admiralty jurisdiction towards land." The court then proceeded specifically to hold that a claimant killed by physically coming into contact with frozen navigable waters by breaking his skull on such waters suffered an injury occurring "on the navigable waters of the United States" and thus his death was compensable under the Longshoremen's Act. This case is certainly not authority for the proposition that a land injury is compensable under the Longshoremen's Act. Judge Harrison L. Winter of this court has likewise recognized the tendency to expand admiralty jurisdiction and in so doing has specifically noted the Calbeck case and the Extension Act. Again his specific holding was that the injury occurred upon navigable waters.

"I do not have any question in my mind but that this accident did occur upon navigable waters of the United States in the sense that the decedent was on the GUAM, which was, although run aground, in the Patapsco River and the Patapsco River is admittedly navigable." (*Boston Metals Company v. O'Hearne*, D.C. D. Md. 1963, Admiralty No. 4412 — oral opinion.)

On appeal, the United States Court of Appeals for the Fourth Circuit affirmed stating "since Harris received his injuries on navigable waters, we agree with the District Judge that Calbeck is controlling in this case." (*Boston Metals Company v. O'Hearne*, 4 Cir. 1964, 329 F. 2d 504, 507.)

The effect, if any, of the Extension Act upon the Longshoremen's Act where the injury occurred upon a dock or pier, as distinguished from an injury occurring upon navigable waters, was raised and was considered in *Atlantic Stevedoring Company v. O'Keeffe*, D.C. S.D. Ga. 1963, 220 F. Supp. 881, 885, where the court after a careful study of the two acts and their respective legislative histories, stated:



"I find nothing to lead me to the conclusion that Congress intended by the Admiralty Extension Act to broaden and enlarge the jurisdiction of the Longshoremen's and Harbor Workers' Act, and I do not believe such jurisdiction can, or should be, extended by implication."

Judge Walter E. Hoffman in *Revel v. American Export Lines*, D.C. E.D. Va. 1958, 162 F. Supp. 279, 283-284 (like-wise a pier case), after a careful analysis of the issues involved, concluded:

"\* \* \* To oust state compensation acts from an established and important area of coverage by reason of the passage of the Extension in Admiralty Act, which makes no reference to the field of compensation law, would create a situation in which a longshoreman, such as the plaintiff herein, would not be covered by any workmen's compensation act, state or federal, as the federal covers only those injuries occurring 'upon the navigable waters', 33 U.S.C.A. § 903(a), and it is established that injuries suffered on piers or docks (as opposed to drydocks) are not included. It can hardly be said that the Extension in Admiralty Act was also intended to amend the federal compensation act to include injuries occurring on land as well as 'upon the navigable waters', and this is especially true when the Supreme Court has said, 'Congress made clear its purpose to permit state compensation protection wherever possible.' *Davis v. Department of Labor and Industries*, 317 U.S. 249, 252, 63 S. Ct. 225, 227, 87 L. Ed. 246. See also *United States Casualty Co. v. Taylor*, 4 Cir., 64 F. 2d 521, 524; *Travelers Ins. Co. v. McManigal*, 4 Cir., 139 F. 2d 949, 951; both opinions by Judge Soper, cf. *Glad-den v. Stockard S.S. Co.*, 3 Cir., 184 F. 2d 510."

On appeal, the United States Court of Appeals for the Fourth Circuit in effect affirmed Judge Hoffman, saying:

"Since *Revel* was injured while standing on the dock (an extension of the land), his remedies are restricted

to those afforded by the local law. *Swanson v. Marra Bros.*, 1946, 328 U.S. 1, 66 S. Ct. 869, 90 L. Ed. 1045; *State Industrial Comm. v. Nordenholt Corp.*, 1922, 259 U.S. 263, 42 S. Ct. 473, 66 L. Ed. 933; Cf. *The Longshoremen's and Harbor Workers' Compensation Act*, 33 U.S.C.A. § 903 and *Kermarec v. Compagnie Generale Transatlantique*, 1959, 358 U.S. 625, 79 S. Ct. 406, 3 L. Ed. 2d 550. *This is true even though the Congress has embraced such cases within the maritime jurisdiction of the United States.* *Extension of Admiralty Act*, 46 U.S.C.A., § 740." (*American Export Lines, Inc. v. Revel*, 4 Cir. 1959, 266 F. 2d 82, 84; emphasis supplied.)

This court is in complete accord with the conclusion that, although certain types of land injuries have, by the enactment of the Extension Act, been embraced within the admiralty and maritime jurisdiction of the United States, the specific jurisdictional requirement of the Longshoremen's and Harbor Workers' Compensation Act that to come within the latter act the injury must occur upon the navigable waters of the United States has not been repealed and reenacted with amendments by implication through the passage of the Extension Act. However, even were this court not in agreement<sup>7</sup> with the pronouncement of the United

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<sup>7</sup> Although having high regard for its author, the one reported case known to this court, and previously discussed (*Michigan Mutual Liability Company v. Arrien*, D.C. S.D. N.Y. 1964, 233 F. Supp. 496), equating "upon the navigable waters of the United States" with "admiralty jurisdiction" due to the "illumination" by implication of the Extension Act is completely unpersuasive to this court both in its reasoning and because of its failure to consider and meet the factors relied upon and found controlling in the earlier "pier" cases ruling on this issue, namely, the *Atlantic Stevedoring Company* case and the *Revel* case, excerpts of which have been quoted just previously in the text above. In addition it should be noted that the *Michigan Mutual* case was not a pier case. The injury occurred upon a removable staging or skid, a situation which the deputy commissioner in effect found to be, and which the Department of Justice now urges is, comparable to a gangplank or ladder situation. An injury upon a gangplank or ladder has long been

States Court of Appeals for the Fourth Circuit, it would consider itself bound by the excerpt quoted above.

Accordingly, this court holds that the compensation order denying compensation benefits and complained of in Admiralty No. 4704, and the compensation order denying compensation benefits and complained of in Admiralty No. 4705, are in accordance with the law. Judgment is hereby entered in favor of the respondent Deputy Commissioner in both of the aforesaid cases and the complaints in both cases are hereby dismissed without costs.

R. DORSEY WATKINS,

United States District Judge.

held to be within the coverage of the Longshoremen's Act. (Ford v. Parker, D.C. D.Md. 1943, 52 F. Supp. 98, an opinion by the late Judge W. Calvin Chesnut).

Since this opinion was drafted the United States Court of Appeals for the Second Circuit has held the injury in the Michigan Mutual case compensable under the Longshoremen's Act on the ground that the skid more closely resembled a gangway than a pier, thus retaining and applying the established distinction between injuries occurring upon navigable waters and injuries occurring upon extensions of land such as piers or wharves. The Second Circuit rejected rather than adopted the lower court's equation of "upon navigable waters" with "admiralty jurisdiction". (Michigan Mutual Liability Co. v. Arrien, 2 Cir. 1965, 344 F. 2d 640, 645 — footnote 3). Circuit Judge Paul R. Hays, dissenting on another ground, specifically noted that "[w]hen Congress adopted the Admiralty Extension Act it had an opportunity to expand federal compensation to cover all longshoremen's injuries caused in loading and unloading vessels. Congress did not take advantage of that opportunity." (344 F. 2d 640, 648-649).

OPINION OF UNITED STATES DISTRICT COURT FOR THE EASTERN  
DISTRICT OF VIRGINIA, NORFOLK DIVISION, FILED  
AND ENTERED SEPTEMBER 10, 1965,  
REPORTED AT 245 F. SUPP. 51.

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[R. Vol. II, pp. 34-42]

In the United States District Court for the Eastern  
District of Virginia, Norfolk Division

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Civil Action No. 4798

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*John W. East,*

*Petitioner,*

*v.*

*Jerry C. Oosting, Deputy Commissioner, United States  
Employees' Compensation Commission, Fifth  
Compensation District,*

*Respondent,*

*United States Lines Company and The Travelers  
Insurance Company,*

*Intervenors.*

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Civil Action No. 4976

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*Albert Avery,*

*Petitioner,*

*v.*

*Jerry C. Oosting, Deputy Commissioner, United States  
Employees' Compensation Commission, Fifth  
Compensation District,*

*Respondent,*

*Liberty Mutual Insurance Company,*

*Intervenor.*

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MEMORANDUM

In substantially identical actions each of petitioners seeks  
a trial *de novo* on the jurisdictional issue, and further

requests the entry of an order setting aside the findings of the Respondent Deputy Commissioner, which were to the effect that the injury in each case did not occur upon the navigable waters of the United States within the meaning of the Longshoremen's and Harbor Workers' Compensation Act.

The two cases have not been consolidated for trial or hearing, but the governing principles in each case are essentially the same and are the subject of this joint memorandum for the convenience of the Court. However, separate orders should be entered and, if appeals are noted, separate notices of appeal should be filed.

In *East*, the petitioner was an employee of the United States Lines Company on June 17, 1963. The employer was engaged in maritime employment on the navigable waters of the United States and, at the time in question, had a verbal agreement with Whitehall Terminal Corporation, a stevedoring concern, to discharge cargo from the S.S. AMERICAN PRESS which was moored on the north side of pier No. 2, Army Base; the pier being owned by the Department of Commerce, Maritime Commission, but the north side being leased to Whitehall Terminal Corporation. The pier is 334 feet wide and projects out over the Elizabeth River at an approximate right angle from the land a distance of 1328 feet. The pier is supported by piles sunk into the river bed. There is a shed on the pier covering a distance of 1280 feet, the first 500 feet being two stories high. The width of the apron of the pier at the extreme offshore end is 40 feet, and on the north side is 36 feet. The depth of the water at mean low water off the end of the pier is from 30 to 35 feet and along the north side of the pier's apron is 30 feet. While not in the finding of the Deputy Commissioner, the parties have stipulated that there was water under the pier of sufficient depth to permit a small barge or a small launch or rowboat to go between the pilings. It is further agreed that no cargo boat could go under the pier. The pier is attached and connected to the land and, as such, is an extension of land. East was employed as a cargo checker and, at times, it became necessary for him

to board vessels. On the day in question East was assigned to check cargo on the north side of Pier No. 2, adjacent to the No. 5 hatch of the AMERICAN PRESS, as the cargo was discharged from the hatch. While checking cargo *under the shed*, he was struck on the leg by a bale of wool which had fallen off a fork lift being operated by an employee of Whitehall. Thus he was on the surface of the pier when he sustained his injury. He was awarded compensation benefits under the Workmen's Compensation Act of Virginia, but the Deputy Commissioner rejected East's claim for benefits under the Longshoremen's and Harbor Workers' Act as the injury sustained did not occur upon the navigable waters of the United States (including any dry dock).

In *Avery*, the petitioner was an employee of Old Dominion Stevedoring Corporation in the capacity of longshoreman at the time of his injury on December 28, 1961. He was assigned, together with other members of the work gang, to an open type railroad car and was engaged in hooking up logs which, in turn, were being hoisted from the railroad car by means of the ship's gear and loaded onto the vessel which was afloat in the Elizabeth River. While a log was being lifted from the railroad car by the ship's gear, petitioner was struck by one or more logs so attached to the vessel's gear, thereby crushing him against the side of the railroad car. The railroad car in question was on the surface of Pier B, City Piers, which is a usual type structure existing in the Norfolk area. The pier is attached to land at one end and extends outward and over the waters of the Elizabeth River, thereby becoming an extension of land. Avery was awarded compensation benefits under Workmen's Compensation Act of Virginia, but the Deputy Commissioner rejected his claim for benefits under the Longshoremen's and Harbor Workers' Act as the injury sustained did not occur upon the navigable waters of the United States (including any dry dock).

In both cases the injury occurred on a pier. In *East*, it took place under a shed on a pier. In *Avery*, the injury

was apparently on the apron area as there is no suggestion of any shed on the pier in question. Moreover, in *Avery*, the injury occurred as a result of an actual loading operation while the ship's gear was attached to logs being hoisted from a railroad car. We do not believe that these minor differences create any contrary rule to the well-established principle of law and the actions of the Deputy Commissioner are approved and affirmed, thus calling for a denial of each petition and a judgment for the respondent in each case.

Initially we may dispose of petitioners' contentions that they are entitled to a trial *de novo* on the jurisdictional issue. Our views on this subject have been previously discussed in *Dixon v. Oosting*, E.D. Va., 238 F. Supp. 25, and we adhere to this ruling. In short, a trial *de novo* on the issue of jurisdictional facts is not mandatory but is a matter of discretion.

We will not repeat the familiar rule that findings of the Commissioner are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole, *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504, or "unless they are irrational," *O'Keeffe v. Smith Associates*, 380 U.S. 359. We recognize these principles as the scope of judicial review.

The main thrust of petitioners' argument is that the water under the pier is sufficient to constitute navigable waters of the United States and, therefore, the injury is compensable under the federal act. From time immemorial piers, docks, wharves and other like structures, which are firmly attached to the land and extend over navigable waters, have been deemed to be extensions of the land, and injuries suffered thereon are compensable only under state compensation laws. *Swanson v. Marra Bros.*, 328 U.S. 1; *American Export Lines, Inc. v. Revel*, 4 Cir., 256 F. 2d 82; *Hastings v. Mann*, 4 Cir., 340 F. 2d 910, cert. den. 380 U.S. 963. If, of course, the damage is caused by a vessel, the Extension of Admiralty Act, 46 U.S.C., § 740, becomes effective but this is clearly not the situation in *East*. As to



*Avery*, it is argued that, while the injury was sustained on the pier, the log or logs were attached to the ship's gear and, therefore, the Admiralty Extension Act of 1948 is applicable. However, the legislative history does not suggest that Congress intended to broaden the coverage afforded by the Longshoremen's and Harbor Workers' Act. Sen. Rep. No. 1593, H.R. No. 1523, 80th Cong., 2nd Sess., 1948, 2 U. S. Code, Cong. & Adm. News 1898. Judicial decisions, even since the landmark case of *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, similarly hold that the coverage is not extended by the Admiralty Extension Act. *Interlake Steamship Company v. Nielsen*, 6 Cir., 338 F. 2d 879, 882; *Hastings v. Mann*, *supra*.

The recent case of *Michigan Mutual Liability Co. v. Arrien*, 2 Cir., 344 F. 2d 640, is especially pertinent in holding that the point of injury is essentially decisive. While the ruling in *Arrien* upheld an award under the Longshoremen's and Harbor Workers' Act, the injured longshoreman was knocked off a temporary "skid" which extended from the pier to the vessel. In declining to analogize a temporary skid to a wharf, Circuit Judge Kaufman said:

"A wharf or pier is usually built on pilings over what was navigable water. When the structure is completed, the water over which it is built is *permanently* removed from navigation as if the structure had been in the first instance built on land."

We are unable to predict what may be forthcoming in considering the extension of coverage under the Longshoremen's and Harbor Workers' Act. However, it is abundantly clear that the Senate Judiciary Committee, in considering the matter in 1927, definitely noted that injuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship. Sen. Rep. 973, 69th Cong., 1st Sess., p. 16.

The fact that, in *East*, the cargo checker occasionally boarded the vessel in the performance of his duties fails to impress us. While it may appear inconsistent to com-

pensate a cargo checker injured aboard a vessel under the federal act and, at the same time, deny him such benefits if injured while on the pier, any recourse is through legislative action by way of amendment to the act.

We do not believe that the *Calbeck* case has materially altered prior rulings as applied to the facts of the two cases now before the Court. *Calbeck* did not involve an injury on a pier; it was concerned with coverage for injuries on a new vessel under construction and afloat upon navigable waters. Moreover, in footnote 10 (370 U.S. 121) Mr. Justice Brennan quotes the language set forth above in the Senate Report which expressly excluded coverage for injuries occurring in loading or unloading "unless they occur on the ship or between the wharf and the ship so as to bring them within the maritime jurisdiction of the United States."

The question presented is not new in the Fourth Circuit. Prior to *Calbeck*, Judge Sobeloff had occasion to comment upon the status of a longshoreman injured on a dock when a drum fell from the ship and rolled along the pier striking him. While the Fourth Circuit held that the longshoreman was not precluded from recovery against the shipowner by reason of the acceptance of state compensation benefits, it also pointed out in *American Export Lines, Inc. v. Revel*, *supra*, at p. 84, that:

"Since Revel was injured while standing on the dock (an extension of the land) his remedies are restricted to those afforded by local law. . . . This is true even though the Congress has embraced such cases within the maritime jurisdiction of the United States. Extension of Admiralty Act, 46 U.S.C.A. § 740."

And in *Hastings v. Mann*, *supra*, a decision subsequent to *Calbeck*, the Fourth Circuit again said:

". . . [I]t has been uniformly held that piers, docks, wharfs and similar structures extending over navigable waters are extensions of land, though their use and purpose be maritime. Damage to such structures

and personal injuries suffered by persons while upon such structures are not compensable in Admiralty, unless, under the 1948 Act, caused by a vessel on navigable waters."

Other circuits have consistently held that persons injured upon a pier are restricted to compensation benefits under state law. *Hagans v. Ellerman & Bucknall S.S. Co.*, 3 Cir., 318 F. 2d 563; *Delaney v. Towmotor Corp.*, 2 Cir., 339 F. 2d 4; *Kent v. Shell Oil Co.*, 5 Cir., 286 F. 2d 746.

The *Avery* case concededly is stronger than *East* as it is at least arguable that Avery's injury was caused by a vessel on navigable water, notwithstanding that such injury was consummated on land, and hence is covered by the Extension of Admiralty Jurisdiction Act of 1948. The difficulty with Avery's contention is that he seeks to equate the terms "admiralty and maritime jurisdiction," as stated in the Act of 1948, with the jurisdictional requirement of the occurrence of the injury "upon the navigable waters" as provided in the Longshoremen's and Harbor Workers' Act. The question was answered by this Court in *Revel v. American Export Lines*, E.D. Va., 162 F. Supp. 279, 283-284, aff'd 4 Cir., sub. nom. *American Export Lines v. Revel*, 266 F. 2d 62, 84. But the *Avery* case is identical with *Johnson v. Traynor, Deputy Commission*, 243 F. Supp. 184, 34 L.W. 2001, decided by Judge R. Dorsey Watkins for the District of Maryland on June 22, 1965. The exhaustive opinion of Judge Watkins cogently points to the reasons why the Admiralty Extension Act of 1948 did not amend the Longshoremen's and Harbor Workers' Act. We adopt the reasoning of the *Johnson* case and concur in this finding, thus disposing of the *Avery* case on the same basis as *East*.

Present orders in accordance with this memorandum.

/s/ WALTER E. HOFFMAN,

United States District Judge.

Norfolk, Virginia

September 10, 1965

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE  
FOURTH CIRCUIT, FILED AND ENTERED JUNE 20,  
1968, REPORTED AT 398 F. 2d 900.

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[R. Vol. III, pp. 85-111]

United States Court of Appeals  
for the Fourth Circuit

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No. 10,060

*Marine Stevedoring Corporation, and Liberty Mutual  
Insurance Company,*

*Appellants,*

*v.*

*Jerry C. Oosting, Deputy Commissioner, United States  
Employees' Compensation Commission, Fifth  
Compensation District,*

*Appellee.*

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Appeal from the United States District Court for the  
Eastern District of Virginia, at Norfolk. Walter  
E. Hoffman, District Judge.

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No. 10,298

*William H. Johnson,*

*Appellant,*

*v.*

*John P. Traynor, Deputy Commissioner, U. S. Department  
of Labor, and Nacirema Operating Co., Inc.,  
a body corporate,*

*Appellees.*

No. 10,299

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*Julia T. Klosek, widow of Joseph T. Klosek,  
deceased employee,*  
*Appellant,*  
*v.*

*John P. Traynor, Deputy Commissioner, U. S. Department  
of Labor, and Nacirema Operating Co., Inc.,  
a body corporate,*  
*Appellees.*

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Appeals from the United States District Court for the  
District of Maryland, at Baltimore. R. Dorsey  
Watkins, District Judge.

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No. 10,323

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*Albert Avery,*  
*Appellant,*  
*v.*

*Jerry C. Oosting, Deputy Commissioner, United States  
Employees' Compensation Commission, Fifth Compensa-  
tion District, and Liberty Mutual  
Insurance Company,*  
*Appellees.*

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Appeal from the United States District Court for the  
Eastern District of Virginia, at Norfolk. Walter  
E. Hoffman, District Judge.

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(Reargued February 5, 1968      Decided June 20, 1968.)

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Before HAYNSWORTH, Chief Judge, SOBELOFF, BOREMAN,  
BRYAN, WINTER, CRAVEN and BUTZNER, Circuit Judges, sit-  
ting en banc.

[Appearance omitted in printing.]

SOBELOFF, Circuit Judge:

The common question presented by these cases consolidated for appeal<sup>1</sup> is whether injuries sustained by four longshoremen while working on the docks and engaged in three separate loading operations are compensable under the Longshoremen's and Harbor Workers' Compensation Act of 1927, 33 U.S.C.A. § 901 et seq. In none of the cases are the facts in dispute; only the intended scope of the Act is contested.

In *Marine Stevedoring v. Oosting*, No. 10,060, a stevedoring company was under contract to handle the lines and cables in moving and mooring the S.S. JAMES E. HAVILAND. Vann, one of its employees, was lifting a cable off the stern bollard when it suddenly straightened, catapulting him off the pier and into the river where he drowned. Death benefits awarded by the deputy commissioner were affirmed by the District Court. 238 F. Supp. 78 (E.D. Va. 1965).

In Nos. 10,298 and 10,299, Johnson and Klosek were members of a longshoremen's "gang" engaged in loading a cargo of steel beams aboard the S.S. BETHTEX, moored to the Bethlehem Steel High Pier, Sparrows Point, Maryland. They had been assigned to the pier to work as "slingers or hook-on men," and it was their job to board the railroad gondola cars used to carry the beams onto the pier and to fasten drafts to the ship's crane in preparation for loading. At the time of the accident, as the crane raised a draft out of the car, it began to rotate. One end of the draft caught Klosek, lifted him from the car and dropped him head first onto the pier, killing him, while the other end struck Johnson and crushed him against the side of the car. The deputy commissioner denied the claim brought by Klosek's widow and also the claim submitted by Johnson, who had sustained disabling injuries. The

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<sup>1</sup> After being heard below as three separate cases, they were consolidated on appeal and were initially argued on February 9, 1966 before a panel of the court consisting of Haynsworth, Chief Judge, and Sobeloff, Circuit Judge, and Hutcheson, District Judge. At the request of the court, the cases were reargued en banc.

District Court affirmed, holding that the injuries had not occurred within the jurisdictional scope of the statute. 243 F. Supp. 184 (D. Md. 1965).

Like Klosek and Johnson, Avery, in No. 10,323, was working as a slinger in a gondola car attaching drafts of logs to a ship's crane for loading. He too was severely injured when a swinging draft pinned him against the side of the car. For the same reasons as in Klosek and Johnson, he was denied relief under the Longshoremen's Compensation Act. The District Court affirmed.

Each of the injured men was a member of a "gang" of approximately twenty assigned by his employer to work on a particular vessel. As was the practice at the ports where these injuries occurred, the entire gang reported to the vessel and two to four of the men were then ordered back onto the pier to work as "slingers or hook-on men" during the loading operation.<sup>2</sup> The job performed by the men on the pier is basically the same as the work done by their fellow longshoremen on board. Indeed, it is not uncommon for the men to rotate positions and continually pass back and forth between ship and wharf during a given operation. Indisputably, at the time of each accident the injured longshoremen were engaged in maritime employment on a high pier at a point several hundred feet from shore. Further, it has been stipulated that the piers in question extended into navigable waters and were sufficiently high to permit the passage of small boats and barges under them.

The Longshoremen's and Harbor Workers' Compensation Act provides in relevant part that:

"Section 3

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee,

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<sup>2</sup> At the time of their injuries, both Vann and Avery were employed at the port in Norfolk, Virginia. While the same practice is followed at the Maryland and Virginia ports, it often varies in other sections of the country. At some ports the assignment of men to particular positions is made on the basis of seniority, the most senior workers being assigned to the hold when the weather is bad and to the pier in good weather. At other ports, the men rotate throughout the day.



but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law."

The issue before us is whether an injury on a pier falls within the jurisdictional provision "upon the navigable waters," and thus within the coverage of the Act.

The answer is found in part in the history of this legislation. Ten years before the passage of the Act, the Supreme Court held that longshoremen injured on vessels or on gangplanks between vessels and piers were exclusively within federal maritime jurisdiction and thus barred from recovery under state compensation acts. *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917); *Clyde S.S. Co. v. Walker*, 244 U.S. 255 (1917). Subsequent efforts by Congress to extend the benefits of existing state acts to maritime injuries were struck down as unconstitutional delegations of the legislative powers of Congress.<sup>3</sup> *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Washington v. Dawson & Co.*, 264 U.S. 219 (1924). In its third attempt to provide compensation for the yet uncovered longshoremen, Congress in 1927 enacted the Longshoremen's Compensation Act.<sup>4</sup>

Denominated "An Act to provide compensation for disability or death resulting from injuries to employees in certain maritime employment," 44 Stat. 1424, the Act em-

<sup>3</sup> Act of October 6, 1917, 40 Stat. 395; Act of June 10, 1922, 42 Stat. 634.

<sup>4</sup> Congress acted partly in response to the Supreme Court's invitation in *Washington v. Dawson Co.*, *supra* at 227, to exercise its maritime powers in order to provide federal coverage for longshoremen: "Without doubt Congress has power to alter, amend or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general employers' liability law or general provisions for compensating injured employees; but it may not be delegated to the several states."

bodies a comprehensive compensation plan for all longshoremen engaged in "loading, unloading, refitting, and repairing ships," on navigable waters. S. Rep. No. 973, 69th Cong., 1st Sess., p. 16. As originally drafted, the bill provided coverage for injuries "on a place within the admiralty jurisdiction of the United States, except employment of local concern and no direct relation to navigation or commerce." S. 3170 & H.R. 9498. Although enthusiastic about its general objectives, representatives of both the unions and the shipping industry uniformly voiced dissatisfaction with the bill's jurisdictional provision. At the Committee hearings, a union spokesman pointed out that as originally drawn, the effect of the bill would necessarily be harmful to repairmen and longshoremen who continually pass back and forth between state and federal jurisdiction, each exclusive of the other. Hearings on S. 3170, Senate Judiciary Committee, 69th Cong., 1st Sess., March 16 and April 2, 1926, pp. 29-31. In the same vein, spokesmen for the shipping industry complained that the bill was not sufficiently inclusive and urged that the final bill "include all maritime employment under the admiralty jurisdiction." Senate Hearings, pp. 95-101. A representative of the Labor Department also appeared and testified that Congress had sufficient power to enact a compensation statute that would extend to all injuries to maritime workers occurring "on the dock, on the bridge and in the ship," and on behalf of the department argued for an amendment to the bill that would provide "coverage of the contract and not coverage of the men in one spot performing one part of the contract." Senate Hearings pp. 40-41.

The lone dissident voice was that of the International Association of Industrial Accident Boards and Commissions, author of the pending bill and the Acts previously declared unconstitutional. It sought to maintain the limited scope of the bill, leaving as much as was constitutionally permissible to the states.

At the conclusion of the hearings, the bill was revised and submitted to Congress in its present form. While no further explanation of the various revisions is to be found in either the committee reports or congressional debates, it

is certainly reasonable to infer that the modifications represent an acquiescence in the broader coverage sought by almost all witnesses and, consequently, a rejection of the narrow jurisdictional position espoused by the IAIABC.

Beyond question, Congress could constitutionally ground jurisdiction on the function or status of the employees, as the Labor Department urged, and thus extend coverage to all longshoremen injured during the loading, unloading, repairing or refitting of vessels regardless of the situs of the injury. See The Admiralty Extension Act, 46 U.S.C.A. § 740 (1948);<sup>5</sup> *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206 (1963); *American Stevedoring v. Porello*, 330 U.S. 446 (1947); *Sanderlin v. Old Dominion Stevedoring Corp.*, 381 F. 2d 1004 (4 Cir. 1967); *Spann v. Lauritzen*, 344 F. 2d 204 (3 Cir. 1965); *United States v. Matson Nav. Co.*, 201 F. 2d 610 (9 Cir. 1953).<sup>6</sup> The question, therefore, is whether Congress fully exercised this power, as the injured longshoremen contend, or whether it incorporated in the revised bill the phrase "upon the navigable waters" specifically to freeze coverage to injuries occurring within the admiralty tort jurisdiction as it was thought to exist in 1927, as the stevedoring and insurance companies insist. While the definitive answer is not forthcoming from either the Act itself or its history, we find substantial support for the conclusion that Congress designed the Act to be status oriented, reaching all injuries sustained by longshoremen in the course of their employment.<sup>7</sup>

<sup>5</sup> The act provides:

"The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."

<sup>6</sup> See also, *Thompson v. Calmar Steamship Corp.*, 331 F. 2d 657 (3 Cir. 1964); *Hagans v. Ellerman and Bucknall Steamship Co.*, 318 F. 2d 563 (3 Cir. 1963); *Puget Sound Bridge & Dry Dock Co. v. O'Leary*, 260 F. Supp. 260, 264 (W.D. Wash. 1966).

<sup>7</sup> The Senate revisions, concurred in by the House, certainly met many of the objections raised by the witnesses; how far they went toward meeting the Labor Department's suggestion that the bill be status oriented is admittedly less clear.

The passage from the Senate Report, No. 973, 69th Cong., 1st Sess. 16, most often relied upon to support the narrow jurisdictional

Prolonged discussion of this issue is now unnecessary, however, since it has been authoritatively resolved by the Supreme Court in *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114 (1962). Quoting with approval the Fifth Circuit in *Debardelen Coal Corp. v. Henderson*, 142 F. 2d 481 (1944), the Court stated:

"The elaborate provisions of the Act, viewed in light of prior Congressional legislation as interpreted

view that Congress intended to limit coverage to injuries occurring within the maritime tort jurisdiction as it was then thought to exist, excluding pier-side injuries, reads as follows:

"The purpose of this bill is to provide for compensation, in the stead of liability, for a class of employees commonly known as 'longshoremen.' These men are mainly employed in loading, unloading, refitting, and repairing ships; but it should be remarked that injuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship so as to bring them within the maritime jurisdiction of the United States."

While it has been said that this passage suggests that the Senate Committee intended the Act to be situs oriented, it is no less reasonable to read the passage as extending the benefits of the Act to all who may be brought within the maritime jurisdiction. Moreover, other passages from the Reports of both Houses indicate that Congress was primarily concerned with the status of the potential claimants. For example in the Senate Report, in the paragraph immediately following the oft-cited passage quoted above, it is stated:

"If longshoremen could avail themselves of the benefits of State compensation laws, there would be no occasion for this legislation; but, unfortunately, *they are excluded from these laws by reason of the character of their employment*; and they are not only excluded but the Supreme Court has more than once held that Federal legislation cannot, constitutionally, be enacted that will apply State laws to this *occupation*. (Emphasis added.) S. Rep. No. 973, 69th Cong., 1st Sess. 16"

To like effect is H.R. Rep. No. 1767, 69th Cong., 2d Sess. 20:

"The principle of workmen's compensation has become so firmly established that simple justice would seem to require that this class of maritime workers should be included in this legislation \* \* \*."

The bill as amended, therefore, will enable Congress to discharge its obligation to the *maritime workers placed under their jurisdiction by the Constitution of the United States* by providing for them a law whereby they may receive the benefits of workmen's compensation and thus afford them the same

by the Supreme Court, leaves no room for doubt, as it appears to us, *that Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject matter.* \* \* \* It is sufficient to say that *Congress intended the compensation act to have a coverage co-extensive with the limits of its authority.*" 370 U.S. at 130. (Emphasis added.)

Those opposed to extending coverage in the instant case argue that *Calbeck* has no bearing since the Supreme Court was not concerned with the meaning of "upon the navigable waters," but was merely interpreting the phrase "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law." In answer, we need only repeat Judge Palmieri's observation in *Michigan Mutual Liability Co. v. Arrien*, 233 F. Supp. 496, 501 (S.D. N.Y. 1965), *aff'd*, 344 F. 2d 640 (2 Cir. 1965), that "[w]hat is just as important as the actual holding in *Calbeck* is the general approach to the [Longshoremen's Compensation] Act taken by the Court. No longer is the Act viewed as merely filling in the interstices around the shore line of the state act, but rather as an affirmative exercise of admiralty jurisdiction."

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remedies that have been provided by legislation for those killed or injured in the course of their employment in nearly every State in the union." (Emphasis added.)

Or, as Congressman LaGuardia summed up:

"This law simply gives the longshoreman the benefit of up-to-date legislation to cover injuries sustained in the course of their employment. That is all there is to it." 68th Cong. Rec. 5414.

We are aware that the Fifth Circuit recently reached the opposite conclusion in *Travelers Insurance Company v. Shea*, 382 F. 2d 344, 346 (1967), stating, "[t]he coverage of the Act is not keyed to function but has uniformly been situs-oriented," relying on its own opinion in *O'Keeffe v. Atlantic Stevedoring Co.*, 354 F. 2d 48, 50 (1965). A refutation of the asserted uniformity appears in the same circuit's decision in *Holland v. Harrison Bros.*, 306 F. 2d 369, 373 n.4 (1962), that while "[t]he literal language of the Longshoremen's Act seems to concern only the locality of the accident, \* \* \* the history of the Act indicates that its underlying purpose was to embrace the admiralty jurisdiction whatever that might be." We think that in the latter decision the Fifth Circuit expressed the correct view.

This affirmative exercise of the admiralty power of Congress "to the fullest extent" of its jurisdiction, creating "a coverage co-extensive with the limits of its authority," can only mean that Congress effectively enacted a law to protect all who could constitutionally be brought within the ambit of its maritime authority. Again, in the words of Judge Palmieri, "it thus appears that 'upon navigable waters' is to be equated with 'admiralty jurisdiction'."

This interpretation of the Act, giving the injured longshoreman the broadest protection, not only fully complies with the mandate of the Supreme Court in *Voris v. Eikel*, 346 U.S. 328, 333 (1953) that the Act be liberally construed, but also comports with the Court's observation in *Calbeck*, *supra* at 123, that the Act should be read to avoid the "uncertainty, expense, and delay of fighting out in litigation" the proper source of compensation, state or federal. As early as 1942, the Court sought to attain this objective by recognizing that the "undefined and undefinable" boundaries between state and maritime jurisdiction created a "twilight zone" of overlapping jurisdictions. *Davis v. Department of Labor and Industries*, 317 U.S. 249. Aptly described by Judge Qua as "designed to include within a wide circle of doubt all water front cases involving aspects pertaining both to land and the sea where a reasonable argument can be made either way," *Moore's Cases*, 323 Mass. 162, 167, 80 N.E. 2d 478, 481, *aff'd sub. nom.*, *Bethlehem Steel Co. v. Moors*, 335 U.S. 874 (1948), this "twilight zone" merely represented a judicial articulation of the presumption of coverage incorporated in the Act.<sup>8</sup>

An alternative route, advocated by some courts, would also extend coverage under the Act. Concluding that Congress had exercised the more limited tort jurisdiction, Judge Palmieri in *Michigan Mutual*, *supra*, and Judge Winter in *Boston Metals v. O'Hearne*, 1946 A.M.C. 2351 (D. Md.

<sup>8</sup> Section 920. Presumptions

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter.

1963), *aff'd*, 329 F. 2d 504 (4 Cir. 1964), *cert. denied*, 379 U.S. 824 (1964), nevertheless found that accidents that might previously have fallen outside the scope of the Act are covered by virtue of the expansion of the admiralty tort jurisdiction. They reasoned, in light of *Calbeck* that the phrase "upon navigable waters" in this remedial legislation was not limited to the tort jurisdiction as it was thought to have existed in 1927, but must be construed to include the full range of the legislatively and judicially expanded concept of maritime jurisdiction.<sup>9</sup> Thus, with the passage of the Admiralty Extension Act, the protection afforded by the Compensation Act was given an expanded construction covering pier-side injuries. Other cases that have read *Calbeck* to enlarge coverage under the Act include *Interlake S.S. Co. v. Nielsen*, 338 F. 2d 879, 882-883 (6 Cir. 1965); *Spann v. Lauritzen*, *supra*;<sup>10</sup> *Puget Sound Bridge & Dry Dock Co. v. O'Leary*, *supra*.<sup>11</sup>

<sup>9</sup> While both judgments were affirmed, by the Second and Fourth Circuits, respectively, in neither case did the Court of Appeals find it necessary to reach this precise issue. There is dictum in the Second Circuit's opinion that an injury on the wharf might not qualify under the Compensation Act. Judge Kaufman, however, specifically reserved the question, stating: "In view of the reasons we have articulated for our holding we find it is unnecessary to decide whether the award may also be sustained on the ground that the Admiralty Extension Act \* \* \* enlarged the coverage of the Longshoremen's Act." 344 F. 2d at 646 n.4. Indeed, the opinion went on to observe that *Calbeck* "has been interpreted, in every appellate decision where the question has arisen, as mandating that a federal compensation award must be upheld if there is a reasonable argument for coverage under the Longshoremen's Act." 344 F. 2d at 646.

<sup>10</sup> Although the issue was not before the court, we read the inclusion of a passage from *Reed v. Yaka*, 373 U.S. 410 (1963) to the effect that "the Longshoremen's and Harbor Workers' Act was not intended to take away from longshoremen the traditional remedies of the sea, so that recovery for unseaworthiness could be had notwithstanding the availability of compensation," as an indication that the Third Circuit would have upheld an award the longshoreman, who, in that case was injured on a pier by the handle of a hopper also located on the pier during the unloading of a vessel.

<sup>11</sup> To the extent that the present opinion deviates from this court's earlier pronouncement in *American Export Lines, Inc. v. Revel*,



Moreover, *Calbeck* is not the only Supreme Court decision pointing inescapably to this conclusion. In *Reed v. Yaka*, 373 U.S. 410, 415 (1963), the Court reiterated its earlier mandate that "the Longshoremen's Act 'must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.'"<sup>12</sup> This direction was then amplified by the explanation that "[i]t would produce a harsh and incongruous result, one out of keeping with the dominant intent of Congress to help longshoremen, to distinguish between liability to longshoremen injured under precisely the same circumstances \* \* \*. [Those] subject to the same danger \* \* \* [are] entitled to like treatment under law."<sup>13</sup> It is precisely such a harsh and incongruous result that the stevedores and their insurers now urge upon us.

We examine a number of these incongruities. First, as noted above, the injured longshoremen were members of a gang all of whom did basically the same work for the same pay and were subjected to the same risks, passing freely from ship to pier in the course of their work. All would concede that a longshoreman crushed by a rotating draft while working in a ship's hold would be entitled to recover under the Act. It would be intolerably harsh and incongruous to deny the same benefits to a longshoreman injured while performing the same task on an adjoining pier.

266 F. 2d 82 (1959), we are of the view that *Rewel* has been overruled by *Calbeck*.

<sup>12</sup> *Voris v. Eikel*, 346 U.S. 328, 333 (1958).

<sup>13</sup> We are of the opinion that the passage quoted above from *Reed v. Yaka* clearly proscribes the conclusion reached by the Fifth Circuit in *Travelers Insurance Company v. Shea*, 382 F. 2d 344, 346 (1967) that "[s]ince there exists hybrid employment with labors terrestrial and maritime and since state coverage does not preclude federal coverage, [*Calbeck*], we do have the paradox of two workers doing the same type of work a few feet apart receiving injuries in the same way, yet treated as legal strangers. The paradox is not judicially soluable unless we extirpate the words 'upon \* \* \* navigable waters \* \* \* (including any dry dock)' from the statutory commandment \* \* \*."

It is noteworthy that the court in *Travelers v. Shea*, *supra*, fails to analyze or consider the impact of *Calbeck* or *Yaka* on the Longshoremen's Compensation Act.

Secondly, courts have held that "upon navigable waters" covers injuries sustained by persons flying over the water, *D'Aleman v. Pan American World Airways*, 259 F. 2d 493 (2 Cir. 1956); working under the water, *Smith v. Brown & Root Marine Operators, Inc.*, 243 F. Supp. 130 (W.D. La. 1965); repairing ships on dry docks or the land around dry docks, *Avondale Marine Ways, Inc. v. Henderson*, 346 U.S. 366 (1953); *Holland v. Harrison Bros. Drydock & Ship Repair Yard, Inc.*, 306 F. 2d 269 (5 Cir. 1962); and constructing dry docks, *Newport News Shipbuilding & Dry Dock Co. v. O'Hearne*, 192 F. 2d 968 (4 Cir. 1951). The phrase "upon navigable waters" has also been held to cover injuries to longshoremen caught by the ship's gear, lifted momentarily from the pier, and dropped either into the slip or onto the pier itself, *O'Keeffe v. Atlantic Stevedoring Company*, 354 F. 2d 48 (5 Cir. 1965); *L'Hote v. Crowell*, 54 F. 2d 212 (5 Cir. 1931); *Richards v. Monahan*, 17 F. Supp. 252 (D. Mass. 1936). In *Interlake v. Nielsen*, *supra*, the Sixth Circuit upheld a judgment obtained on behalf of a maritime employee who drowned when he drove his car off the end of a pier. And presumably, the Act would further extend to a longshoreman injured in the waters immediately beneath the pier regardless of how he got there; but not, the stevedores here contend, to injuries sustained by maritime workers performing traditional maritime tasks, injured on a pier above the water.

The harshness and incongruity that would necessarily result in light of precedents above cited if we were to deny coverage to pier-side injuries like those with which we are here concerned is readily apparent from the disparate treatment of the four longshoremen in the instant case. Although all, at the time of their injuries, were performing similar jobs exposing them to similar risks, only Vann, who happened to fall into the water, and Klosek, who was momentarily lifted from the pier, would qualify under the Act. Such fine-spun distinctions are clearly condemned by *Yaka*, *supra*.

A third incongruity, that would be frozen into law if the contentions of the stevedores were to prevail, is appar-

ent from broad liberal construction that has been applied to the term "dry dock," *Holland v. Harrison Bros.*, *supra*,<sup>14</sup> compared with the very narrow interpretation they would attach to the phrase "upon navigable waters." We perceive no rational justification for this diverse treatment.

Finally, the parties have stipulated that small vessels are able to navigate beneath the piers on which the accidents in the instant cases took place. These waters are therefore navigable in fact.<sup>15</sup> Since the jurisdictional scope of the

<sup>14</sup> Dry docks were held to include the land surrounding them. See *Newport News Shipbuilding & Dry Dock Co. v. O'Hearne*, *supra*.

<sup>15</sup> We recognize that this conclusion appears to be in conflict with that recently reached by the Second Circuit in *Michigan Mutual Liability Co. v. Arrien*, 344 F.2d 640, 644 (1965). Speaking for that court, Judge Kaufman stated: "A wharf or pier is usually built on pilings over what *was* navigable water. When the structure is completed, the water over which it is built is *permanently* removed from navigation as if the structure had been in the first instance built on land." With all deference, we find no support for this conclusion. It conflicts with the Supreme Court's holding that "when once found to be navigable, a waterway remains so." *United States v. Appalachian Power Co.*, 311 U.S. 377, 408 (1940); *Economy Light Co. v. United States*, 256 U.S. 113 (1921).

The generally accepted test of navigability was laid down by the Court in *Daniel Ball*, 77 U.S. 557, 563 (1870) as follows: "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And *they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce*, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." (Emphasis added.) More recently, the Supreme Court declared that "[t]he fact \* \* \* that artificial obstructions exist capable of being abated by due exercise of the public authority, does not prevent the stream from being regarded as navigable in law, if, supposing them to be abated, it be navigable in fact in its natural state." *Economy Light and Power Co. v. United States*, *supra* at 118. See *Montello*, 87 U.S. 430, 431 (1874) ("If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact \* \* \*"); *Ingram v. Associated Pipeline Contractors, Inc.*, 241 F. Supp. 4 (E.D. La. 1965); *Madole v. Johnson*, 1965 A.M.C. 2610.

In light of these cases, Judge Waterman, also of the Second Circuit, concluded that a body of water is "navigable water" if "(1)

phrase "upon navigable waters" extends to injuries occurring "above" such waters, see *D'Aleman v. Pan American Airways*, *supra*, we are compelled to conclude that the injuries suffered by Vann, Johnson, Klosek and Avery were all sustained upon the navigable waters of the United States.

Regardless of the route traveled, we arrive at the conclusion that the injuries of all four longshoremen are embraced by the Act. In rejecting the arguments advanced by the stevedoring companies, we are mindful of the pertinent observations of Judge Soper, presaging the recent Supreme Court decisions, that "[t]he reference to 'maritime employment' and injury 'upon the navigable waters of the United States (including any dry dock),' should be broadly construed," and that the coverage of the Act "should not be frustrated by needless refinements." *Newport News Shipbuilding and Dry Dock Co. v. O'Hearne*, 192 F. 2d 968, 971 (4 Cir. 1951).

We are well aware that the conclusions reached in this opinion have not been uniformly adopted in other circuits. See *Houser v. O'Leary*, 383 F. 2d 730 (9 Cir. 1967); *Travelers Insurance Company v. Shea*, 382 F. 2d 344 (5 Cir. 1967); *Nicholson v. Calbeck*, 385 F. 2d 221 (5 Cir. 1967); but see, also in the Fifth Circuit, *Holland v. Harrison Bros. Dry Dock and Repair Yard, Inc.*, *supra*. However, for the reasons fully developed herein, we decline to follow them.

We therefore affirm the judgment of the District Court upholding the deputy commissioner's award in *Marine Stevedoring v. Oosting*, No. 10,060, and reverse the judgments in *Johnson, Klosek and Avery*, Nos. 10,298, 10,299

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it presently is being used or is suitable for use, or (2) it has been used or was suitable for use in the past, or (3) it could be made suitable for use in the future by reasonable improvements." *Rochester Gas and Electric Corp. v. F.P.C.*, 344 F. 2d 594 (1965). Certainly the waters in the instant case were navigable prior to the construction of the piers, will again be open to unlimited navigation if the piers are ever removed, and most relevantly, are now used in navigation. We would say, therefore, that the waters flowing beneath the piers upon which these accidents occurred are navigable in fact. *Cf. Nicholson v. Calbeck*, 385 F. 2d 221 (5 Cir. 1967).

and 10,323 which affirmed the denial of recovery and remand these cases for the entry of judgments consistent with this opinion.

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HAYNSWORTH, Chief Judge, with whom BOREMAN, Circuit Judge, joins, dissenting:

I concur in the affirmance of *Marine Stevedoring Corporation v. Oosting*, in which the longshoreman met his death by drowning, but I respectfully dissent in the other cases, in which the longshoremen died or were injured on the dock. When construing a statute, as we are, it is not for us heedlessly to pursue our own notion of what the congressional judgment should have been or to deal cavalierly with restrictions specified by Congress. Nor do we serve the purpose of eliminating incongruity by transferring it elsewhere in multiplied form and creating a vast area of uncertainty which can only be resolved by extensive litigation.

I had thought there could be little doubt about the intention of the Congress when it enacted the Longshoremen's and Harbor Workers' Compensation Act in 1927. Until then, longshoremen were covered by the compensation act of the state in which they were working as long as they were on the dock, but they had no such protection when they were on the ship or a gangplank. Twice the Congress attempted to extend state compensation statutes to longshoremen when aboard a ship on navigable waters or on a gangplank between such a ship and the dock,<sup>1</sup> a result which would, at least, have put all longshoremen in the same state on a parity, but the Supreme Court, having earlier held that a state compensation act could not reach such a person,<sup>2</sup> struck down each statute as an unlawful delegation of congressional legislative power.<sup>3</sup> It was this

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<sup>1</sup> Act of October 6, 1917, 40 Stat. 395; Act of June 10, 1922, 42 Stat. 634.

<sup>2</sup> *Southern Pacific Co. v. Jensen*, 244 U.S. 205; *Clyde S.S. Co. v. Walker*, 244 U.S. 255.

<sup>3</sup> *Washington v. Dawson & Co.*, 264 U.S. 219; *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149.

very limited purpose to secure the benefits of some compensation system to longshoremen while working aboard a ship or while passing between the ship and the dock that prompted the Congress to enact its own compensation act when its attempts to extend the state statutes had been frustrated.

This purpose was clearly expressed in § 3 of the Act,<sup>4</sup> in which compensation protection was extended to injuries "occurring upon the navigable waters of the United States (including any drydock)" the limit of admiralty tort jurisdiction as it was then understood,<sup>5</sup> "and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law." The use of the words "upon the navigable waters of the United States" was clearly referable to the prior history of the problem deriving from the Supreme Court's decision in *Southern Pacific Co. v. Jensen*, *supra* n.2, and the additional caveat that the injury be beyond the constitutional power of the states to compensate would seem to foreclose any doubt about the congressional intention in 1927.<sup>6</sup>

If there is any doubt about the congressional intention in the language of the statute, any notion that dockside

<sup>4</sup> 33 U.S.C.A. § 903.

<sup>5</sup> *Crowell v. Benson*, 285 U.S. 22, 55; *Nogueira v. N.Y., N.H. & H. R.R. Co.*, 281 U.S. 128, 133, 138; *Washington v. Dawson*, 264 U.S. 219, 227, 235; *State Industrial Commission v. Nordenholt Corp.*, 259 U.S. 263, 273; *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52, 59-60; *Cleveland Terminal & Valley R.R. Co. v. Cleveland S.S. Co.*, 208 U.S. 316.

<sup>6</sup> I recognize, of course, that the qualification that the injury be beyond the constitutional reach of state compensation acts may have been inserted for the purpose of demonstrating the congressional intention of remaining within the assumed limits of congressional power, *De Bardeleben Coal Corp. v. Henderson*, 5 Cir., 142 F. 2d 481, and that it was disregarded in that *tour de force*, which provided a highly practical, but "theoretic[ally] illogic[al]" solution to the problem of the "twilight zone" in which both the federal and the state statutes arguably may be said to apply. *Davis v. Department of Labor and Industries*, 317 U.S. 249, 259. Since our task is to define congressional intention, however, the words have an obvious and cogent relevance.

injuries were intended to be covered is foreclosed by the legislative history. This was the third attempt to fill the void the Supreme Court's decisions had delineated. Congress sought to do no more. That purpose could hardly have been made more explicit than by the language in the Senate Report No. 973, 69th Cong., 1st Sess., 16, in which it was stated, "injuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship so as to bring them within the maritime jurisdiction of the United States."

It is true, of course, that a remedial statute such as the Longshoremen's and Harbor Workers' Compensation Act should be liberally construed to achieve its purpose, but not to pervert it. This one has been appropriately construed. The liberality with which it has been construed is exemplified by such cases as those holding that a marine railroad is a drydock within the drydock inclusion,<sup>7</sup> that injuries sustained upon or after contact with the water are within the coverage of the statute even though the longshoreman was on the dock before falling or being propelled into the water,<sup>8</sup> by those cases holding the federal act applicable to workers aboard the floating hull of a vessel under construction,<sup>9</sup> or aboard the grounded hull of a decommissioned vessel being dismantled,<sup>10</sup> and to workers engaged in the construction or repair of drydocks,<sup>11</sup> and by

<sup>7</sup> *Avondale Marine Ways, Inc. v. Henderson*, 346 U.S. 366; *Holland v. Harrison Bros. Drydock & Ship Repair Yard, Inc.*, 5 Cir., 306 F. 2d 369; *Western Boat Bldg. Co. v. O'Leary*, 9 Cir., 198 F. 2d 409; *Maryland Cas. Co. v. Lawson*, 5 Cir., 101 F. 2d 732; *Continental Cas. Co. v. Lawson*, 5 Cir., 64 F. 2d 802. *But see O'Leary v. Puget Sound Bridge & Drydock Co.*, 9 Cir., 349 F. 2d 571.

<sup>8</sup> *O'Keeffe v. Atlantic Stevedoring Co.*, 5 Cir., 354 F. 2d 48; *Interlake S.S. Co. v. Nielsen*, 6 Cir., 338 F. 2d 879; *Puget Sound Bridge & Dry Dock Co. v. O'Leary*, 260 F. Supp. 260 (W.D. Wash. 1966); *Beasley v. O'Hearne*, 250 F. Supp. 49 (S.D. W.Va. 1966); *Gulf Oil Co. v. O'Keeffe*, 242 F. Supp. 881 (E.D. S.C. 1965); *Thomsen v. Bassett*, 36 F. Supp. 956 (W.D. Mich. 1940). These are the cases that justify the affirmance of the award in *Marine Stevedoring Corp. v. Oosting*.

<sup>9</sup> *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114.

<sup>10</sup> *Boston Metals Co. v. O'Hearne*, 4 Cir., 329 F. 2d 504.

<sup>11</sup> *Newport News Shipbuilding & Dry Dock Co. v. O'Hearne*, 4 Cir., 192 F. 2d 968; *Travelers Ins. Co. v. McManigal*, 4 Cir., 139 F. 2d 949; *Travelers Ins. Co. v. Branham*, 4 Cir., 136 F. 2d 873.



those other cases which have attempted to bridge the fine line drawing the boundary between the reach of the federal and the state statutes.<sup>12</sup> It is significant, however, that in all of these cases outside of the drydock inclusion, the employee's injuries were suffered on the seaward side of the wharf's edge or resulted from an event occurring when the employee was aboard a ship, whether or not commissioned, or while in the act of passing between the ship and the dock. Strictly dockside injuries suffered on the dock as a result of forces exerted there have not been held to be covered. There has thus been a liberal interpretation of the congressional intention as expressed in the Senate Report, but the cases are consistent with that expression of intention.

To a limited extent some of the cases read out of the statute the limitation that the injury be beyond the power of the state to compensate, but the excision of that proviso was very restricted and partial, and done solely for the purpose of avoiding uncertainties and the loss of rights through an erroneous choice of remedy. Thus the federal statute and the state statute are both allowed to apply in the narrow area of the dock's edge where either statute arguably may be said to apply,<sup>13</sup> but nothing the Supreme Court said in *Calbeck* or elsewhere suggests that, contrary to the

<sup>12</sup> *Davis v. Department of Labor and Industries*, 317 U.S. 249; *Parker v. Motor Boat Sales*, 314 U.S. 244; *Michigan Mut. Liab. Co. v. Arrien*, 2 Cir., 344 F. 2d 640; *Taylor v. Baltimore & Ohio R.R. Co.*, 2 Cir., 344 F. 2d 281; *De Bardeleben Coal Corp. v. Henderson*, 5 Cir., 142 F. 2d 481; *L'Hote v. Crowell*, 5 Cir., 54 F. 2d 212; *Dixon v. Oosting*, 238 F. Supp. 25 (E.D. Va. 1965); *Machillo v. New York Cent. R.R. Co.*, 200 F. Supp. 805 (S.D. N.Y. 1962); *Caldaro v. Baltimore & Ohio R.R. Co.*, 166 F. Supp. 833 (E.D. N.Y. 1958); *West v. Erie R.R. Co.*, 163 F. Supp. 879 (S.D. N.Y. 1958); *Ford v. Parker*, 52 F. Supp. 98 (D. Md. 1943); *Richards v. Monahan*, 17 F. Supp. 252 (D. Mass. 1936).

<sup>13</sup> *Moore's Cases*, 323 Mass. 162, 80 N.E. 2d 478 (1948), *Aff'd sub. nom. Bethlehem Steel Co. v. Moores*, 335 U.S. 874. See also *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114; *Baskin v. Industrial Accident Commission*, 338 U.S. 854; *Davis v. Department of Labor and Industries*, 317 U.S. 249.



plainly expressed intention of the Congress, the reach of the federal statute may be extended to injuries which are clearly on the dockside of the line. The *Calbeck* opinion, itself, limits its applicability to injuries on navigable waters within the area delineated by *Jensen*, *Knickerbocker* and *Dawson*, and by those cases made questionable.<sup>14</sup>

In this scheme of things, of course, there is some incongruity when a member of a stevedoring crew injured on the dock is covered by the state statute while a member of the same crew injured on the ship is covered by the federal, and, if during the day, the same fellow works part of the time on the ship and part of the time on the dock, he passes from one jurisdiction to the other, but he is never without the protection of one statute or the other. The scheme has, at least, the virtue of as large an amount of certainty as could be provided in any division of authority. The edge of the dock is as clear a line as could be drawn. Except in the very rare case, there will be no doubt as to the remedy to be pursued, and doubtful cases need occasion little litigation. If the line is moved shoreward of the dock's edge, short of inclusion of every longshoreman wherever he may be and however he may be injured, it is bound to be vague and fuzzy and a fruitful source of contention and litigation, a circumstance quite inconsistent with the highly desirable certainty which should accompany any system of workmen's compensation.

We, as judges, may think that it would be nice and equitable if all longshoremen were provided compensation protection by the same act, so that each would receive the same benefits from the same administrative agency wherever and however he was injured. That is one of the three alternative theories the majority employs to reach its conclusion, but the "status theory," as opposed to the "situs theory," has been firmly rejected by every court that has ever considered it<sup>15</sup> until now the majority embraces it. There is some support for the theory that coverage of the

<sup>14</sup> 370 U.S. 114, 126-127.

<sup>15</sup> *Travelers Ins. Co. v. Shea*, 5 Cir., 382 F. 2d 344; *O'Keeffe v. Atlantic Stevedoring Co.*, 5 Cir., 354 F. 2d 48. See also *Houser v. O'Leary*, 9 Cir., 383 F. 2d 730. But see *Holland v. Harrison Bros. Drydock & Ship Repair Yard, Inc.*, 5 Cir., 306 F. 2d 369, 373 n.4.

Compensation Act expanded with the expansion of admiralty's tort jurisdiction,<sup>16</sup> but not for the majority's conclusion that the Compensation Act was initially intended, or later grew, to be coextensive with the admiralty's contract jurisdiction. The phrasing of the statute, as well as its history, shows a rejection, not an adoption, of the suggestion of the Department of Labor that the contract be covered rather than places. Had it been intended to adopt the contract theory, the statutory language "on the navigable waters" could hardly have been more inappropriate for effectuation of that intention. The words, introduced as a substitute for the words, "within the admiralty jurisdiction," require a "situs" approach, as all courts have held or assumed, not a "status" approach.

Next it is said by the majority that the compensation statute was amended by the Admiralty Extension Act of 1948,<sup>17</sup> which extended the admiralty tort jurisdiction to injuries sustained on land, provided they were caused by a vessel on navigable waters. The Ninth Circuit has rejected this theory in a recent case<sup>18</sup> in which the Supreme Court denied certiorari just three months ago.<sup>19</sup> As Judge Watkins pointed out in one of the opinions from which these appeals come,<sup>20</sup> no such intention is evident in the Admiralty Extension Act, its legislative history or the subsequent legislative history of the Compensation Act. The Admiralty Extension Act contains no reference to the Compensation Act, and five days after enactment of the Admiralty Extension Act the Compensation Act was amended to increase the benefits payable,<sup>21</sup> but neither in that amendment or in any of its legislative history is there any

<sup>16</sup> See *Michigan Mut. Liab. Co. v. Arrien*, 233 F. Supp. 496 (S.D. N.Y. 1964) ; *Boston Metals v. O'Hearne*, 1964 A.M.C. 2351 (D. Md. 1963). The issue was not reached on appeal in either case.

<sup>17</sup> 46 U.S.C.A. § 740.

<sup>18</sup> *Houser v. O'Leary*, 9 Cir., 383 F. 2d 730.

<sup>19</sup> *Houser v. O'Leary*, 390 U.S. 954.

<sup>20</sup> *Johnson v. Traynor*, 243 F. Supp. 184, 190-192 (D. Md. 1965). See also *Travelers Ins. Co. v. Shea*, 5 Cir., 382 F. 2d 344, 349-350, cert. denied 389 U.S. 1050, approvingly quoting Judge Watkins' reasoning.

<sup>21</sup> 62 Stat. 602.

reference to the Admiralty Extension Act. Bearing in mind the initial deliberate choice of the Congress to substitute the words "upon the navigable waters" as the definition of the covered injuries for the words "within the admiralty jurisdiction,"<sup>22</sup> as was first proposed in 1927 when the Compensation Act was enacted, a holding that the Admiralty Extension Act enlarged the scope of the Compensation Act appears a judicial ukase without legislative support.

Finally, the majority attempts to support its conclusion on the theory that the waters beneath the piers in these cases were navigable, because it either appears or it is assumed that they could be traversed by a skiff or a canoe, which leads them to the conclusion that an injury on the dock above such waters is "upon the navigable waters of the United States." This theory, of course, flies in the face of the settled doctrine that the pier is an extension of the land.<sup>23</sup> It has been specifically rejected by the Fifth Circuit in two very recent cases,<sup>24</sup> in which the Supreme Court denied certiorari only five months ago.<sup>25</sup> Again, it seems to me wholly inconsistent with the congressional mandate which governs us and the clearly expressed congressional intention.

<sup>22</sup> Had those words been adopted by the Congress, they would furnish some basis for the majority's contract theory; their rejection by the Congress refutes the theory.

<sup>23</sup> *Swanson v. Marra Bros., Inc.*, 328 U.S. 1; *Minnie v. Port Huron Terminal Co.*, 295 U.S. 647; *T. Smith & Son, Inc. v. Taylor*, 276 U.S. 179; *State Industrial Commission v. Nordenholt Corp.*, 259 U.S. 263; *Cleveland Terminal & Valley R.R. Co. v. Cleveland S.S. Co.*, 208 U.S. 316; *The Plymouth*, 70 U.S. (3 Wall.) 20; *Houser v. O'Leary*, 9 Cir., 383 F. 2d 730, *cert. denied* 390 U.S. 954; *O'Keeffe v. Atlantic Stevedoring Co.*, 5 Cir., 354 F. 2d 48; *Michigan Mut. Liab. Co. v. Arrien*, 2 Cir., 344 F. 2d 640; *Hastings v. Mann*, 4 Cir., 340 F. 2d 910; *Wiper v. Great Lakes Engineering Works*, 6 Cir., 340 F. 2d 727; *American Export Lines, Inc. v. Revel*, 4 Cir., 266 F. 2d 82; *O'Loughlin v. Parker*, 4 Cir., 163 F. 2d 1011; *Johnson v. Marshall*, 9 Cir., 128 F. 2d 13; *Benedict on Admiralty* § 29 (6 ed.); *Gilmore & Black, The Law of Admiralty* § 6-46 (1957 ed.); *Robinson on Admiralty* § 11 (1939 ed.).

<sup>24</sup> *Nicholson v. Calbeck*, 5 Cir., 385 F. 2d 221; *Travelers Ins. Co. v. Shea*, 5 Cir., 382 F. 2d 344.

<sup>25</sup> *Nicholson v. Calbeck*, 389 U.S. 1051; *McCullough v. Travelers Ins. Co.*, 389 U.S. 1050.

If the majority's conclusion may be thought to be justified by its statement of the desirability of elimination of incongruity, consider the barrel of incongruities its opinion will create.

A longshoreman working on a quay or wharf at the harbor's edge and beneath which no waters flow but to which a vessel being loaded is tied, would not be covered by the federal statute under the third theory adopted by the majority, though one working nearby upon that portion of a pier which is seaward of high water would be covered. On the same pier a longshoreman would be covered if he was on the seaward side of high water when hurt and not covered if he were not. Under the status theory a longshoreman would be covered wherever he was injured, even several miles from the water on an errand to pick up supplies and however he was hurt, but on the Admiralty Extension Act amendment theory he would not be covered even though working on a pier beneath which waters flow, unless his injury was caused by the vessel or by some equipment appurtenant to the vessel. Is he covered under the majority's conclusion if he is working on a pier beneath which waters flow and not covered if he is working on a quay? Is he covered if his injuries are caused by a shore-based crane engaged in loading the ship, but not covered if he is struck by a switch engine moving empty freight cars? Is he covered when struck down by an automobile on a street while on the way to get supplies from a stevedore's warehouse? Since the contract theory would bring all longshoremen within the coverage of the Act, reference to the other theories suggests that coverage would exist only if the circumstances satisfied all three of them. Would any two suffice?

The majority answers none of these questions. I would not suppose it appropriate that they now undertake to do so, but they illustrate the multitude of incongruities they would substitute for those they seek to eliminate and the extensive uncertainty they introduce in an area in which costly and prolonged litigation ought not to be necessary to ascertain the appropriate remedy.

Congress, if it wishes, may amend the statute to extend its coverage in a rational way to some point of reasonable

certainty. The Court in deciding specific cases can achieve no such comprehensive result, and its attempt to do so is a grave distortion of the statute which seems to me plainly to limit us and to provide for compensation only for injuries suffered arguably on the seaward side of the edge of the dock.

Though the Supreme Court's decision in *Davis v. Department of Labor and Industries*, *supra* n. 12, "astonished, bewildered and occasionally outraged the legal profession,"<sup>26</sup> it served the very practical purpose of eliminating confusion within the defined twilight zone, confusion which the Supreme Court rightly regarded as unfair to employers and employees alike. Now we take the other road to spread confusion where none existed before and to sow vast thickets of controversy and litigation which no system of workmen's compensation can afford.

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### JUDGMENT

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(Filed June 20, 1968)

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[R. Vol. III, p. 113.]

United States Court of Appeals for the Fourth Circuit

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No. 10,298

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William H. Johnson,

Appellant,

v.

John P. Traynor, Deputy Commissioner, U. S. Department  
of Labor, and Nacirema Operating Co., Inc.,  
a body corporate,

Appellees.

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Appeal from the United States District Court for the  
District of Maryland.

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<sup>26</sup> Gilmore & Black, *The Law of Admiralty* 349 (1957 ed.).

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the United States District Court for the District of Maryland, at Baltimore, for further proceedings consistent with the opinion of the Court filed herein.

SIMON E. SOBELOFF,  
United States Circuit Judge.

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JUDGMENT

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(Filed June 20, 1968)

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[R. Vol. III, p. 210.]

United States Court of Appeals for the Fourth Circuit

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No. 10,299

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*Julia T. Klosek, widow of Joseph J. Klosek,  
deceased employee,*

*Appellant,*

*v.*

*John P. Traynor, Deputy Commissioner, U. S. Department  
of Labor, and Nacirema Operating Co., Inc.,  
a body corporate,*

*Appellees.*

---

Appeal from the United States District Court for the District of Maryland.

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the United States District Court for the District of Maryland, at Baltimore, for further proceedings consistent with the opinion of the Court filed herein.

SIMON E. SOBELOFF,  
United States Circuit Judge.

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### JUDGMENT

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(Filed June 20, 1968)

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[R. Vol. III, p. 288.]

United States Court of Appeals for the Fourth Circuit

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No. 10,323

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Albert Avery,

Appellant,

v.

*Jerry C. Oosting, Deputy Commissioner, United States Employees' Compensation Commission, Fifth Compensation District, and Liberty Mutual Insurance Company,*

Appellees.

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Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of Virginia, at Norfolk, for further proceedings consistent with the opinion of the Court filed herein.

SIMON E. SOBELOFF,

United States Circuit Judge.

Of

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1968

No. ~~1003~~

9

**NACIREMA OPERATING CO., INC. AND LIBERTY  
MUTUAL INSURANCE COMPANY,**  
*Petitioners,*

v.

**WILLIAM H. JOHNSON, JULIA T. KLOSEK AND  
ALBERT AVERY,**  
*Respondents.*

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

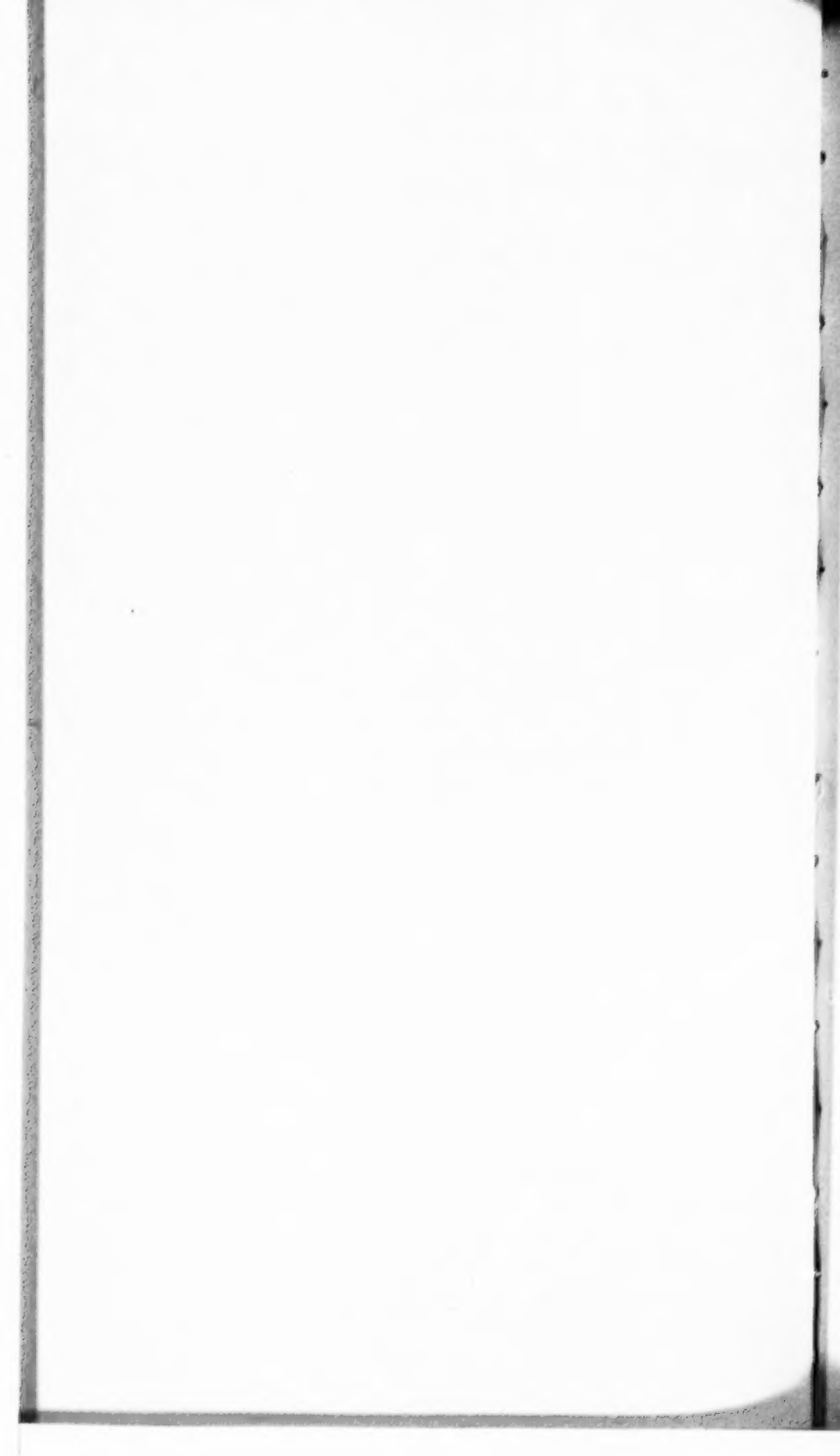
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For Nacirema Operating Co., Inc.

September 16, 1968



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IN THE  
**Supreme Court of the United States**

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OCTOBER TERM, 1968

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No. -----

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**NACIREMA OPERATING CO., INC. AND LIBERTY  
MUTUAL INSURANCE COMPANY,**

*Petitioners,*

**v.**

**WILLIAM H. JOHNSON, JULIA T. KLOSEK AND  
ALBERT AVERY,**

*Respondents.*

---

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

---

Nacirema Operating Co., Inc. and Liberty Mutual Insurance Company pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fourth Circuit, sitting *en banc*, entered in this cause on June 20, 1968.

**OPINIONS BELOW**

The orders of John P. Traynor, Deputy Commissioner, Bureau of Employees' Compensation, Fourth Compensation District, in the William H. Johnson and Julia T. Klosek cases are unreported but are set forth, respectively, in Appendix B, pp. 3a and 5a, and the opinion of the United States District Court for the District of Maryland, affirm-

ing the orders, is reported in 243 F. Supp. 184, 1965 A.M.C. 1825 (Appendix B, p. 8a).

The order of Jerry C. Oosting, Deputy Commissioner, Bureau of Employees' Compensation, Fifth Compensation District, in the Albert Avery case is likewise not reported but is set forth in Appendix B, p. 31a, and the unreported opinion of the United States District Court for the Eastern District of Virginia, Norfolk Division, appears in Appendix B, p. 33a.

The opinion of the United States Court of Appeals for the Fourth Circuit (Appendix B, p. 40a) is reported in ..... F. 2d .....

### **JURISDICTION**

The judgments sought to be reviewed were entered on June 20, 1968 (Appendix C, p. 65a (Johnson); p. 66a (Klosek); p. 67a (Avery)). The jurisdiction of this Court is invoked under 28 U.S.C.A., Sec. 1254(1).

### **QUESTIONS PRESENTED**

1. Whether an injury sustained by a longshoreman while working on a pier is one which occurred upon the navigable waters of the United States and is thus within the coverage of the Longshoremen's and Harbor Workers' Compensation Act.

2. Whether the Admiralty Extension Act of 1948 broadens the jurisdiction of the Longshoremen's and Harbor Workers' Compensation Act to include injuries sustained while working on the land.

### **STATUTES INVOLVED**

The statutes involved are:

1. Longshoremen's and Harbor Workers' Compensation Act as amended (33 U.S.C.A., Sec. 903(a)):

"Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law . . ." (Appendix A, p. 1a).

2. Admiralty Extension Act of 1948, 46 U.S.C.A., Sec. 740:

"The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

"In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: *Provided*, That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948, and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: *Provided further*, That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage." (Appendix A, p. 1a).

### STATEMENT OF THE CASE

This case arose out of pier injuries to three longshoremen, one of whom died, in accidents occurring under almost identical circumstances. The jurisdiction of the district courts was invoked under 33 U.S.C.A., Sec. 921(b) as all three accidents involved compensation claims and



a review of separate compensation orders in which the deputy commissioners held the claims were not covered by the Longshoremen's Act.

William H. Johnson and Joseph J. Klosek, longshoremen, employees of Nacirema Operating Co., Inc., were working in a gondola car on the Bethlehem Steel High Pier, Sparrows Point, Maryland, and were members of a gang of longshoremen engaged to load steel beams aboard the SS BETHTEX on November 14, 1963. As "slingers" it was their job to secure beams stowed in the car to a fall attached to one of the ship's cranes so that the drafts could be picked up and loaded into the vessel's holds. At approximately 4:15 p.m., a draft which was raised swung, propelled Klosek out of the car on to the pier and pinned Johnson against the side of the car. Klosek died some hours later as a result of the injuries he sustained.

Similarly, Albert Avery, a longshoreman in the employ of Old Dominion Stevedoring Co., insured by Liberty Mutual Insurance Company, was working in a gondola car on Pier B, City Piers, Norfolk, Virginia on December 28, 1961. Avery, like Johnson and Klosek, was also a "slinger" and was engaged in hooking ship's gear to a draft of logs. He was injured when the draft struck him and crushed him against the side of the car.

The Johnson and Klosek cases were heard simultaneously by Deputy Commissioner John P. Traynor, Fourth Compensation District, as the injuries and death resulted from the same accident. In separate compensation orders Deputy Commissioner Traynor rejected the two claims under the Longshoremen's Act, stating that neither the employment nor the injuries sustained took place upon the navigable waters of the United States (Appendix B, pp. 3a and 5a respectively).

Appeals from the two compensation orders of Deputy Commissioner Traynor were argued together in the United

States District Court for the District of Maryland and the orders were affirmed. (*Johnson v. Traynor*, 243 F. Supp. 184 [D. Md. 1965]; Appendix B, p. 8a). The district judge agreed that the accidents had not occurred upon navigable waters and further found that the jurisdiction of the Longshoremen's Act had not been extended by the Admiralty Extension Act of 1948.

Deputy Commissioner Jerry C. Oosting entertained the claim for compensation benefits in the Albert Avery case upon a stipulation of the facts and by formal order rejected the claim assigning as his reason therefor that the injury sustained by the claimant did not occur on the navigable waters of the United States within the meaning of the Longshoremen's and Harbor Workers' Compensation Act (Appendix B, p. 31a).

Thereafter, the claimant appealed the decision of the Deputy Commissioner to the United States District Court For the Eastern District of Virginia, Norfolk Division. The District Court affirmed the decision of the Deputy Commissioner determining that inasmuch as the injury occurred on a pier, an extension of land, it did not occur upon the navigable waters of the United States. The District Court further decided that the Admiralty Extension Act of 1948 was inapplicable and that it did not extend the jurisdiction of the Longshoremen's Act (Appendix B, p. 33a).

All three cases, Johnson, Klosek and Avery, were appealed. The court below after first having heard the cases in separate panels felt the questions involved were of such importance as to warrant being heard by the entire court. Of its own motion, therefore, re-argument *en banc* was ordered by the court, the cases were consolidated for rehearing, together with one other case for which no petition for certiorari is sought, and the cases were re-argued together.

In a 5-2 decision, the court below reversed the judgments of the district courts. The majority of the court felt that this Court's decision in *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114 (1962) and the legislative history compelled reversal; further, that the Admiralty Extension Act had broadened the jurisdiction of the Longshoremen's Act.

The vigorous dissent of Chief Judge Haynsworth, concurred in by Judge Boreman, disagreed completely and pointed out that "the 'status theory' as opposed to the 'situs theory' has been uniformly rejected by every court that has ever considered it until now the majority embraces it" (Appendix B, p. 61a).<sup>\*</sup> Moreover, Judge Haynsworth cited the legislative history as strong support for his conviction that the district courts should be affirmed.

### REASONS FOR GRANTING THE WRIT

1. The decision of the court below is in direct conflict with two recent decisions of the United States Court of Appeals for the Fifth Circuit, *Travelers Insurance Company v. Shea*, 382 F. 2d 344, cert. den. 389 U.S. 1050; *Nicholson v. Calbeck*, 385 F. 2d 221, cert. den. 389 U.S. 1051; and with the recent decision of the United States Court of Appeals for the Ninth Circuit, *Houser v. O'Leary*, 383 F. 2d 730, cert. den. 390 U.S. 954, all three of which were decided well after this Court's decision in *Calbeck v. Travelers Insurance Co.*, *supra*, the case relied upon by the majority below as requiring reversal of the district court decisions. The United States Court of Appeals for the Ninth Circuit, in *Houser v. O'Leary*, *supra*, referred specifically to the

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<sup>\*</sup> The reference is to the majority's expressed viewpoint that compensation benefits should be paid to longshoremen and other harbor workers on the basis of the label of their jobs ("status theory") rather than on the basis of their location at the time of the injury ("situs theory").

decision of this Court in *Calbeck v. Travelers Insurance Co.*, *supra*, and concluded that *Calbeck* did not support the claimant's contentions that coverage under the Longshoremen's Act was co-extensive with the limits of Admiralty jurisdiction and consequently that it was no longer necessary for an injury to occur "upon the navigable waters of the United States" to be covered by the Act (383 F. 2d 730 at pp. 731-732).

The Fifth and Ninth Circuits in the cases above cited flatly held that pier injuries are not within the coverage of the Longshoremen's Act. The court below only a few months later reached precisely the opposite result.

Indeed, the United States Court of Appeals for the Fourth Circuit has conceded that its decision conflicted with decisions from the Fifth and Ninth Circuits in the following language:

"We are well aware that the conclusions reached in this opinion have not been uniformly adopted in other circuits [Citing cases]. However, for the reasons fully developed herein, we decline to follow them" (Appendix B, p. 56a).

2. The key question here presented — whether a pier injury to a longshoreman is covered by the Longshoremen's Act — is of critical and immediate importance in the administration of that Act throughout the country by deputy commissioners, under the Department of Labor.

The statute involved being a federal one, it is, of course, extremely important that it be uniformly interpreted and applied throughout the country. It has been so interpreted and applied until the decision below. Unless the writ is issued and the conflict between the circuits resolved by this Court, the result will be that a longshoreman injured on the pier in one of the states within the Fourth

Circuit will receive compensation under the federal statute while one so injured in one of the states in the Fifth or Ninth Circuits will have to file his claim and receive his compensation under the compensation act of the state in which he happens to be working at the time of his accident. Obviously, such a situation was never intended by the Congress.

A longshoreman injured in one of the other circuits will not know whether to proceed under his state or the federal act. Undoubtedly, he will apply to the act which provides the larger payments or benefits and equally undoubtedly his employer will object. Consequently, there will be a great deal of litigation unless this Court settles the question now. As pier injuries occur daily, the decision in this case affects a great many people, involves very substantial sums of money and is of vital interest to all stevedoring companies, their compensation carriers and their longshoremen employees.

Clearly it is in the public interest for this Court to settle once and for all the question raised by the decision of the United States Court of Appeals for the Fourth Circuit as to the correct interpretation of the federal statute.

3. The decision below creates more problems and incongruities than it resolves. Reference to many of them was made by Judge Haynsworth in his well-reasoned dissenting opinion (Appendix B, pp. 63a-64a).

4. It is submitted that the decision below is plainly erroneous. The Longshoremen's Act provides compensation coverage for disability or death occurring "upon the navigable waters of the United States (including any dry dock) . . ." Structures such as the piers here involved, permanently attached to the shore and to the ground

beneath the water, have been uniformly held by this Court, by the court below, by other courts and by competent text writers to be extensions of the land. Accidents which take place on them, therefore, cannot be held to have occurred "upon the navigable waters" (See cases cited in Judge Haynsworth's dissenting opinion below, Appendix B, pp. 62a-63a).

Nor has the majority correctly interpreted the legislative history of the Longshoremen's Act. As stated in the dissent (Appendix B, p. 56a) the Act was passed to provide compensation coverage for longshoremen working aboard ship where coverage had not hitherto existed. Prior to the passage of that Act in 1927, only those longshoremen working on the dock were covered and then only by their state compensation acts.

Finally, the court below erred in concluding that the Admiralty Extension Act of 1948 expanded the coverage of the Longshoremen's Act to include all areas within the admiralty jurisdiction. This is clearly and forcefully pointed out by Chief Judge Haynsworth in his dissenting opinion when he said,

"As Judge Watkins pointed out in one of the opinions from which these appeals come, no such intention is evident in the Admiralty Extension Act, its legislative history or the subsequent legislative history of the Compensation Act. The Admiralty Extension Act contains no reference to the Compensation Act, and five days after enactment of the Admiralty Extension Act the Compensation Act was amended to increase the benefits payable, but neither in that amendment nor in any of its legislative history is there any reference to the Admiralty Extension Act. Bearing in mind the initial deliberate choice of the Congress to substitute the words 'upon the navigable waters' as the definition of the covered injuries for the words 'within the ad-

miralty jurisdiction,' as was first proposed in 1927 when the Compensation Act was enacted, a holding that the Admiralty Extension Act enlarged the scope of the Compensation Act appears a judicial ukase without legislative support." (Appendix B, p. 62a. References to footnotes are omitted).

### CONCLUSION

For the foregoing reasons it is urged that a writ of certiorari issue to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

WILLIAM A. GRIMES,  
Counsel for Petitioner,  
Nacirema Operating Co., Inc.

WILLIAM B. ELEY,  
Counsel for Petitioner,  
Liberty Mutual Insurance  
Company.

Of Counsel:

RANDALL C. COLEMAN,  
For Nacirema Operating Co., Inc.



## APPENDIX A

## STATUTES

**LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT**  
(33 U.S.C.A., Sec. 903(a))

"Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof."

**ADMIRALTY EXTENSION ACT OF 1948**  
(46 U.S.C.A., Sec. 740)

"The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

"In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: *Provided*, That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclu-

sive remedy for all causes of action arising after June 19, 1948, and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: *Provided further*, That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage."

APPENDIX B

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COMPENSATION ORDER OF DEPUTY COMMISSIONER JOHN P.  
TRAYNOR, FILED AT BALTIMORE, MARYLAND, JUNE 8, 1964.

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U. S. Department of Labor  
Bureau of Employees' Compensation  
Fourth Compensation District

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Case No. 1236-1270

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*In the Matter of the Claim for Compensation under the  
Longshoremen's and Harbor Workers'  
Compensation Act.*

---

William H. Johnson,

Claimant,

v.

Nacirema Operating Co., Inc.,

Employer,

The Travelers Insurance Co.,

Insurance Carrier.

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Such investigation in respect to the above entitled claim having been made as is considered necessary, and a hearing having been duly held in accordance with law, and supplemental legal briefs having been submitted by both parties as an addendum to legal briefs submitted at the hearing, the Deputy Commissioner makes the following:

FINDINGS OF FACT

That on the 14th day of November 1963 the claimant above named was in the employ of the employer above named at Baltimore, in the State of Maryland, in the Fourth Compensation District established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under the said Act was insured by The Travelers Insurance Co.; that the employer herein on the date of injury had other employees engaged in maritime em-

ployment; that on said day the claimant herein was employed by the employer herein, and was while performing such employment assigned to and stationed in a gondola type railroad car, where he was engaged in hooking up approximately ten ton drafts of steel beams, which drafts were being hoisted from the gondola type railroad car by means of a ship's crane, which crane was located on the vessel SS "Bethtex", which vessel was afloat in the Patapsco River at Sparrows Point, Maryland; that while thus engaged in hooking up drafts of steel a draft of steel claimant had hooked up swung back while it was being hoisted by the ship's crane and struck the claimant, pinning him against side of gondola car; that as a result of being struck by the draft of steel and being pinned against the gondola the claimant sustained serious injury resulting in his disability; that the pier on which the injury took place is a structure permanently affixed to the land at its northernmost end; that the surface of the pier extends over the waters of the Patapsco River in a southerly direction; that the pier is approximately six hundred feet long; that the pier's surface itself consists of three sets of railroad tracks on each side, which are extensions of track originating in the railroad shifting yard of the adjacent Bethlehem Steel properties; that there is a fifty foot center strip on the pier's surface, which is covered by steel plating; that the pier due to its affixation and connection to the land is an extension of the land; that the vessel SS "Bethtex" at the time of the injury was docked stern in on the east side of the pier; that the gondola car in which claimant was working at the time of his injury was situated parallel to and alongside the vessel; that the gondola car was sixty feet in length, ten feet in width and nine feet in height; that written notice of injury was not given to the employer within thirty days, but that the employer had knowledge of the injury and has not be prejudiced by failure to receive such written notice; that the employer furnished the claimant with medical treatment, etc., in accordance with Section 7(a) of said Act; that the incident of 14 November 1963 had its inception and culmination on the surface of the pier; that the surface of the pier is situated over the navigable waters known as the Patapsco River;

that the incident of 14 November 1963 does not constitute "an injury occurring upon the navigable waters of the United States including any dry dock" (Section 3(a));

Upon the foregoing findings of fact it is ordered by the Deputy Commissioner that the claim for compensation benefits be, and it hereby is rejected for the following reasons: that the claimant's employment on 14 November 1963 was not upon the navigable waters of the United States (including any dry dock), nor did the injury that he sustained on that date occur upon the navigable waters of the United States (including any dry dock).

Given under my hand and filed at Baltimore, Maryland, this 8th day of June 1964.

JOHN P. TRAYNOR,  
Deputy Commissioner,  
Fourth Compensation District.

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COMPENSATION ORDER OF DEPUTY COMMISSIONER JOHN P. TRAYNOR, FILED AT BALTIMORE, MARYLAND, JUNE 8, 1964.

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U. S. Department of Labor  
Bureau of Employees' Compensation  
Fourth Compensation District

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Case No. 1236-1269

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*In the Matter of the Claim for Compensation under the  
Longshoremen's and Harbor Workers'  
Compensation Act.*

*Julia T. Klosek, widow of Joseph J. Klosek,  
deceased employee,*

*Claimant,*

v.

*Nacirema Operating Co., Inc.,*

*Employer,*

*The Travelers Insurance Co.,*

*Insurance Carrier.*

Such investigation in respect to the above entitled claim having been made as is considered necessary, and a hearing having been duly held in accordance with law, and supplemental legal briefs having been submitted by both parties as an addendum to legal briefs submitted at the hearing, the Deputy Commissioner makes the following:

#### FINDINGS OF FACT

That on the 14th day of November 1963 the decedent employee above named was in the employ of the employer above named at Baltimore, in the State of Maryland, in the Fourth Compensation District established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under the said Act was insured by The Travelers Insurance Co.; that the employer herein on the date of injury had other employees engaged in maritime employment; that on said day the decedent herein was employed by the employer herein, and was while performing such employment assigned to and stationed in a gondola type railroad car, where he was engaged in hooking up approximately ten ton drafts of steel beams, which drafts were being hoisted from the gondola type railroad car by means of a ship's crane, which crane was located on the vessel SS "Bethtex", which vessel was afloat in the Patapsco River at Sparrows Point, Maryland; that while thus engaged in hooking up drafts of steel a draft of steel decedent had hooked up swung back while it was being hoisted by the ship's crane and struck decedent and propelled him head first out of the gondola car onto the pier; that as a result of the injury sustained through being struck by the draft of steel and being propelled onto the pier decedent expired on 14 November 1963, shortly after such injury; that the pier on which the fatal injury took place is a structure permanently affixed to the land at its northernmost end; that the surface of the pier extends over the waters of the Patapsco River in a southerly direction; that the pier is approximately six hundred feet long; that the pier's surface itself consists of three sets of railroad tracks on each side, which are extensions of track originating in

the railroad shifting yard of the adjacent Bethlehem Steel properties; that there is a fifty foot center strip on the pier's surface, which is covered by steel plating; that the pier due to its affixation and connection to the land is an extension of the land; that the vessel SS "Bethtex" at the time of the injury was docked stern in on the east side of the pier; that the gondola car in which decedent was working at the time of his fatal injury was situated parallel to and alongside the vessel; that the gondola car was sixty feet in length, ten feet in width and nine feet in height; that written notice of injury and death was not given to the employer within thirty days, but that the employer had knowledge of the injury and death and has not been prejudiced by failure to receive such written notice; that the employer furnished the deceased with medical treatment, etc., in accordance with Section 7(a) of the said Act; that Julia T. Klosek, born 7 October 1914 and married to the deceased on 10 November 1940, is the surviving wife of the deceased; that the decedent's widow, Julia T. Klosek, filed timely claim against the employer for death benefits under the Longshoremen's and Harbor Workers' Compensation Act on her own behalf and on behalf of the three minor children of the decedent herein; that Victor Henry, born 31 March 1947, Rose Veronica, born 11 March 1950, and Judy Ann, born 30 July 1955, are the minor children of the claimant; that the incident of 14 November 1963 had its inception and culmination on the surface of the pier; that the surface of the pier is situated over the navigable waters known as the Patapsco River; that the incident of 14 November 1963 does not constitute "an injury occurring upon the navigable waters of the United States including any dry dock" (Section 3(a));

Upon the foregoing findings of fact it is ordered by the Deputy Commissioner that the claim for death benefits be, and it hereby is rejected for the following reasons: that the decedent's employment on 14 November 1963 was not upon the navigable waters of the United States (including any dry dock), nor did the injury that he sustained on that date occur upon the navigable waters of the United States (including any dry dock).

Given under my hand and filed at Baltimore, Maryland,  
this 8th day of June 1964.

JOHN P. TRAYNOR,  
Deputy Commissioner,  
Fourth Compensation District.

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OPINION OF UNITED STATES DISTRICT COURT FOR THE DISTRICT  
OF MARYLAND, FILED AND ENTERED JUNE 22, 1965, RE-  
PORTED AT 243 F. SUPP. 184, 1965 A.M.C. 1825.

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In the United States District Court for the  
District of Maryland

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Admiralty No. 4704

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*William H. Johnson*

v.

*John P. Traynor, Deputy Commissioner,  
United State Department of Labor  
and  
Nacirema Operating Company, Inc.,  
a body corporate.*

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Admiralty No. 4705

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*Julia T. Klosek, widow of Joseph J. Klosek,  
deceased employee*

v.

*John P. Traynor, Deputy Commissioner,  
United States Department of Labor  
and  
Nacirema Operating Company, Inc.,  
a body corporate*

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(Filed: June 22, 1965.)

John J. O'Connor, Jr., O'Connor and Preston, Baltimore,  
Maryland, for complainants.



Randall C. Coleman and Thomas W. Jamison, III, Baltimore, Maryland, for respondent Nacirema Operating Company, Inc.; Thomas J. Kenney, United States Attorney and Joseph H. H. Kaplan, Baltimore, Maryland, for Deputy Commissioner.

R. DORSEY WATKINS, District Judge:

These companion proceedings were brought by William H. Johnson, injured longshoreman, and Julia T. Klosek, widow of Joseph J. Klosek, deceased longshoreman, pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A., section 901 et seq. (the Longshoremen's Act) to review and set aside, as not in accordance with law, compensation orders filed by John P. Traynor, Deputy Commissioner, United States Department of Labor, denying compensation benefits under the act to the claimants. The factual background giving rise to each claim is identical, the same legal question is presented as to each claim and counsel for the respective parties are the same in each case. Accordingly, the Deputy Commissioner held a combined hearing on both claims and in this court likewise the proceedings for review in both cases have been combined.

The facts as found by the Deputy Commissioner are not in dispute. On November 14, 1963 Johnson and Klosek, longshoremen and employees of the Nacirema Operating Company, Inc., were engaged in loading the S.S. Bethtex, a vessel afloat in the navigable waters of the Patapsco River at Sparrows Point, Maryland. Both men were assigned to and stationed in a gondola type railroad car which was sixty feet in length, ten feet in width and nine feet in height and was positioned on railroad tracks on the High Pier at the Bethlehem Steel Plant at Sparrows Point. The longshoremen were engaged in hooking up approximately ten ton drafts of steel beams which were then hoisted from the railroad car by use of a crane located on the S.S. Bethtex. One such draft while being lifted into a hold of the vessel swung back, struck Klosek and propelled him head first out of the gondola onto the

pier, fatally injuring him. Johnson was pinned by the same draft against the side of the gondola car and suffered serious injuries. The pier on which the accident took place is permanently affixed to the land at its northernmost end. Its surface extends over the waters of the Patapsco River in a southerly direction. The pier is approximately six hundred feet long and its surface consists of three sets of railroad tracks on each side, which tracks are extensions of tracks originating in the railroad shifting yard of the adjacent Bethlehem Steel properties. There is a fifty foot center strip on the pier which is covered by steel plating. At the time of the injury the "S.S. Bethtex" was docked stern in on the east side of the pier. The gondola car in which the decedent and injured claimant were working was situated parallel to and alongside the vessel on the third railroad track.

Claims were filed on behalf of both claimants under the Maryland Workmen's Compensation Act. (Article 101, section 1 et seq., Annotated Code of Public General Laws of Maryland, 1957 Edition.) Johnson has been paid in accordance with the Maryland State Workmen's Compensation Act schedule and although Mrs. Klosek has apparently not as yet received any benefits, her claim has not been contested by Nacirema Operating Company or its insurance carrier and the court is advised that it is anticipated that compensation will be forthcoming under the Maryland Act.

In addition Johnson and Mrs. Klosek submitted timely claims against Nacirema Operating Company under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. 901 et seq.; he for temporary and permanent disability and she for death benefits. Answers were filed on behalf of the employer and insurance carrier raising, among other defenses, lack of jurisdiction over the subject matter of the compensation claims. The hearing before the Deputy Commissioner was limited to the question of jurisdiction and it is the sole issue before this court. The Deputy Commissioner rejected both claims for compensation on the ground that the disability of Johnson and the death of Klosek did not result "from an injury occurring

*upon the navigable waters of the United States (including any dry dock)*", emphasis supplied, as that jurisdictional prerequisite for the applicability of, and for coverage under, the provisions of the Longshoremen's and Harbor Workers' Compensation Act has been interpreted by the courts.

Section 903(a) of Title 33, U.S.C.A., entitled "Coverage" provides, in pertinent part:

"(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law."

Claimants urge two grounds for finding them within the coverage of the Act:

(1) That in simple fact both wharves and ships are upon the water and that accordingly there should be no difference in the result as to coverage between injuries occurring on a wharf or pier over and upon navigable waters and injuries occurring on a deck of a vessel over and upon navigable waters and (2) that in any event the Extension of Admiralty Jurisdiction Act of 1948 (46 U.S.C.A. 740) by embracing within the admiralty and maritime jurisdiction of the United States Courts certain shoreside injuries has likewise extended the coverage of the Longshoremen's and Harbor Workers' Compensation Act to injuries occurring on land. The court will consider these two contentions in turn.

(1) It has been uniformly held that structures such as wharves, piers, etc., affixed permanently to shore and bed, are extensions of land, remedies for injuries upon which are restricted to those afforded by local rather than admiralty law. (*Swanson v. Marra Brothers*, 1946, 328 U.S. 1, 66 S. Ct. 869, 90 L. Ed. 1045; *State Industrial Commission v. Nordenholt Corp.*, 1922, 259 U.S. 263, 42 S. Ct. 473,

66 L. Ed. 933; *American Export Lines, Inc., v. Revel*, 4 Cir. 1959, 266 F. 2d 82, 84; see also: *Hastings v. Mann*, 4 Cir. 1965, 340 F. 2d 910, 911-912; *Benedict on Admiralty*, section 29, page 64, 6th Edition; *Gilmore & Black, The Law of Admiralty*, section 6-46, page 339, 1957 Edition; and *Robinson on Admiralty*, section 11, page 81, 1939 Edition.) In the *Nordenholt* case, decided prior to the enactment of the Longshoremen's Act, the Supreme Court of the United States clearly held that an injury incurred by a longshoreman who, while engaged in unloading a vessel lying in navigable waters, slipped and fell on the "dock"<sup>1</sup> was a land injury and, therefore, that recovery for such an injury was governed by the local state workmen's compensation act and not by general maritime law. After the enactment of the Longshoremen's Act the Supreme Court of the United States reaffirmed the principle set out in the *Nordenholt* case and adhered to it without deviation in the *Swanson* case. *Swanson*, a longshoreman, while on a pier and while engaged in loading cargo on a vessel lying alongside, was injured when a life raft fell from the vessel and struck him. The specific question before the court was whether or not the longshoreman had a right of action against his employer, a stevedoring company, under the Jones Act while working on shore. The court clearly treated the stevedore's injury as a land injury and in interpreting the inter-relationship of the Longshoremen's Act and the Jones Act stated:

"We must take it that the effect of these provisions of the Longshoremen's Act is to confine the benefits of the Jones Act to the members of the crew of a vessel plying in navigable waters and to substitute for the right of recovery recognized by the *Haverty*

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<sup>1</sup> Webster's Third New International Dictionary, Unabridged, recognizes that the meaning of the word "dock" is not restricted to "a waterway extending between two piers or projecting wharves or cut into land for the reception of ships" (4 dock 1 C) but may also properly be used to describe a structure built on pilings such as a wharf or pier (4 dock 2 A), the word being used in the latter sense in the *Nordenholt* case.

case<sup>[2]</sup> only such rights to compensation as are given by the *Longshoremen's Act*. But since this act is restricted to compensation for injuries occurring on navigable waters, it *excludes* from its own terms and from the Jones Act *any remedies* against the employer for *injuries inflicted on shore*. The Act leaves the injured employees in such cases to pursue the remedies afforded by the local law, which this Court has often held permits recovery against the employer for injuries inflicted by land torts on his employees who are not members of the crew of a vessel." (Swanson v. Marra Bros., 1946, 328 U.S. 1, 7, emphasis supplied.)

Eleven years after the enactment of the Extension of Admiralty Jurisdiction Act of 1948, the United States Court of Appeals for the Fourth Circuit clearly and unmistakably stated in the *Revel* case that the Nordenholt-Swanson principle was still the law. *Revel*, a stevedore, was working on the pier alongside a hold preparing cargo to be hoisted onto the vessel and stowed in the hold. A pallet load of drums, part of the cargo being hoisted, fell onto the pier injuring him. He thereafter received and accepted compensation in accordance with the local state workmen's compensation act. Subsequently, he brought suit, to recover damages for his personal injuries, against the owner of the vessel which he had been helping to load at the time of the accident. On appeal, in analyzing the injured longshoreman's right of recovery as against his stevedoring company employer the United States Court of Appeals for the Fourth Circuit said:

"Since *Revel* was injured while standing on the dock (an extension of the land), his remedies are re-

<sup>2</sup> In *International Stevedoring Company v. Haverty*, 1926, 272 U.S. 50, 47 S. Ct. 19, 171 L. Ed. 157, a longshoreman, who was injured while stowing cargo and while on but not employed by a vessel lying in navigable waters, was allowed to bring suit under the Jones Act against his stevedore company employer to recover for injuries allegedly caused by the employer's negligence. This decision was, of course, rendered prior to the enactment of the *Longshoremen's Act*, which now provides the "exclusive" right of recovery of the longshoreman against his employer.

stricted to those afforded by the local law. *Swanson v. Marra Bros.*, 1946, 328 U.S. 1, 66 S. Ct. 869, 90 L. Ed. 1045; *State Industrial Comm. v. Nordenholt Corp.*, 1922, 259 U.S. 263, 42 S. Ct. 473, 66 L. Ed. 933; . . ." (*American Export Lines, Inc. v. Revel*, 4 Cir. 1959, 226 F. 2d 82, 84.)

In contrast to the myriad of cases holding that wharves, pilings, piers and like structures are extensions of land,<sup>3</sup> not one case has been cited by the claimants holding, or even suggesting, that a pier or similar structure could be considered not as being an extension of land but rather as being upon navigable waters. Accordingly, this court holds that the High Pier at the Bethlehem Steel Plant at Sparrows Point is an extension of land and that the death and injury occurring thereon did not occur "upon the navigable waters of the United States."

(2) The claimants thus fall back on their argument that the Extension of Admiralty Jurisdiction Act of 1948, 46 U.S.C.A., section 470, by embracing within the admiralty and maritime jurisdiction of the United States certain shoreside injuries, in effect amended the coverage provision of the Longshoremen's and Harbor Workers' Compensation Act and extended coverage under the latter act to certain types of land injuries. For claimants to prevail an amendment must be shown because it is clear that, when the Longshoremen's Act was initially passed in 1927, Congress did not intend to extend coverage to land injuries

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<sup>3</sup> See in addition to those previously cited: *Cleveland Terminal Railroad Company v. Cleveland Steamship Company*, 1908, 208 U.S. 316, 28 S. Ct. 414, 52 L. Ed. 508; *Smith & Son v. Taylor*, 1928, 276 U.S. 179, 48 S. Ct. 228, 72 L. Ed. 520; *Johnson v. Marshall*, 9 Cir. 1942, 128 F. 2d 13, cert. den. 1942, 317 U.S. 629, 63 S. Ct. 44, 87 L. Ed. 508; *Kent v. Shell Oil Co.*, 5 Cir. 1961, 286 F. 2d 746; *Connor v. United States, et al.*, D.C. E.D. Pa. 1949, 87 F. Supp. 847; and the recent cases of *Gutierrez v. Waterman Steamship Corp.*, 1963, 373 U.S. 206, 83 S. Ct. 1185, 10 L. Ed. 2d 297; *Hagans v. Ellerman and Bucknall Steamship Company*, 3 Cir. 1963, 318 F. 2d 563, 582.

although it had been urged to. One writer stated the problem in 1926 as follows:

"The fact that admiralty has never assumed jurisdiction over longshoremen while on the dock (*Nordenholt* case) indicates definitely that, so far as the courts are concerned, the work of loading and unloading vessels will continue to be a divided process as regards work on and off the vessel, unless legislation intervenes. \* \* \* the only inclusive method remaining is for Congress to assume jurisdiction over the entire subject, either as elements in the performance of maritime contracts or by virtue of its power under the commerce clause of the Constitution." (Clark, "The Longshoreman and Accident Compensation", 22 Monthly Labor Review (April 1926), pages 5 and 18.)

Much of the testimony before the Senate urged that the coverage provisions of the bill extend to land injuries as well as injuries upon navigable waters. Mr. William F. Dempsey, representing the International Longshoremen's Association, declared that the bill should be drafted to cover a longshoreman even were he injured on the dock:

"If he is working in maritime employment it is the same whether on the docks or on board ship, because the cargo has to be assembled on the dock and handled there in order to go on board ship." (Senate Hearings, pages 26 to 27.)

Mr. Lindley D. Clark, for the Bureau of Labor Statistics, pointed out that Congress in enacting this legislation could rely for its authority not only upon the admiralty and maritime power but also upon the commerce clause of the Constitution:

"There is control of the whole contract of loading, unloading, work on the dock, on the bridge, and on the ship, and it is the earnest desire of Commissioner Stewart that a bill should cover the contract, cover the job and not simply the man when he is on the ship." (Senate Hearings, page 40.)



The "earnest desire" of the Commissioner was not realized. The act as finally passed blended the two traditional bases of admiralty jurisdiction, contract (the existence of the employment relationship) and tort (the situs of the injury), and as to this latter element, the only one at issue in the instant proceedings, adopted the familiar admiralty rule for jurisdiction over torts — occurrence upon navigable waters. The line had to be, and has to be, drawn somewhere. Congress drew it between the land and the navigable waters of the United States.<sup>4</sup> The legislative history of the act clearly shows this to be the case. S. Rep. No. 973, 69th Cong., 1st Sess., at page 16 states:

"The purpose of this bill is to provide for compensation, in the stead of liability, for a class of employees commonly known as 'longshoremen.' These men are mainly employed in loading, unloading, refitting, and repairing ships; but it should be remarked that *injuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship so as to bring them within the maritime jurisdiction of the United States.*" (emphasis supplied.)

Coverage of injuries occurring on the wharf was advertently omitted. Thus, there is no question but that at least until the enactment of the Extension of Admiralty Jurisdiction Act of 1948, 46 U.S.C.A., section 740, the Longshore-

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<sup>4</sup> Congress did not draw the line as some might argue, as the ludicrous result of using the situs of injury test for coverage, between the thin longshoreman and the fat longshoreman. At the time of the Senate hearings, prior to the enactment of the Longshoremen's Act, an attorney for various interested labor organizations while testifying generally in support of the bill and as to its need noted that if a longshoreman fell while going between the ship and the wharf and hit the wharf, he would be covered under local law, but if he fell between the ship and the wharf he would be denied state compensation and no federal compensation as yet existed. He used as an illustration of the complexities and sometimes the absurdities of jurisdictional problems the case of the fat longshoreman who, in falling, hit both the wharf and the ship (Senate Hearings, pages 29-30). Lines are often difficult to draw but in the enactment of legislation the duty, and indeed the sole authority, to draw the line is that of Congress.



men's Act was "restricted to compensation for injuries occurring on navigable waters", "exclude[d] from its own terms \* \* \* any remedies against the employer for injuries inflicted on shore", and left "the injured employees in such cases to pursue the remedies afforded by the local law \* \* \*." (Swanson v. Marra Brothers, Inc., 1946, 328 U.S. 1, 7, 66 S. Ct. 869, 90 L. Ed. 1045.)

The Extension of Admiralty Jurisdiction Act of 1948, enacted two years after the Swanson decision, provides in part:

"The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."

Certainly the Extension Act does not strike down the distinction previously made by the courts between land injuries and water injuries. Indeed the act expressly recognizes the existence of land injuries as distinguished from injuries occurring on navigable water. But claimants would have this court equate the jurisdictional requirement of the Longshoremen's Act of the occurrence of the injury "upon the navigable waters" with occurrence of the injury within the "admiralty jurisdiction" of the United States as that jurisdiction is spelled out in the Extension of Admiralty Jurisdiction Act above and thus extend coverage of the compensation act to certain shoreside injuries not therefore covered.<sup>5</sup> The Extension Act cannot be so

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<sup>5</sup> Again with reference to the possible inequities arising in the case of the thin longshoreman, possibly covered only by the monetarily less advantageous provisions of a state workmen's compensation act, as distinguished from the fat longshoreman, having recourse to either state or federal coverage, it should be noted that even were the court, in an effort to cure such inequities, seize upon the Extension Act as a means of extending the coverage of the Longshoremen's Act, a longshoreman who while engaged in the loading or unloading of a vessel suffered injuries on a pier would not be entitled to compensation under the Federal Act unless the court could also spell out that his injury was, in some manner,

construed. First, it is significant that in enacting the Longshoremen's Act Congress specifically chose the phrase "navigable waters" in preference to the phrase "admiralty jurisdiction". As originally introduced, the Longshoremen's Act contained a provision covering "any employment performed on a place *within the admiralty jurisdiction* of the United States, except employment of local concern and of no direct relation to navigation and commerce". (Hearings on S. 3170, Senate Judiciary Committee, 69th Cong., 1st Sess., page 2; emphasis supplied.) After much discussion over the advisability of the "local concern" exception, this exception was omitted and the phrase "navigable waters" substituted for the reference to admiralty jurisdiction. Had Congress considered the two phrases identical there would have been no need for the substitution of one for the other. "The exclusion of on-shore injuries to maritime employees otherwise within the Act may have reflected doubts as to Congressional power, in a statute passed under the Constitutional grant of admiralty jurisdiction, to go beyond the highwater mark, or it may have been a policy decision to leave as much as possible to the state compensation commissions." (Gilmore & Black, *The Law of Admiralty*, page 339, 1957 Edition.)

Secondly, the Extension Act is certainly not an express amendment of the Longshoremen's Act. It is completely silent as to the Longshoremen's Act. Similarly a contemporaneous amendment of the Longshoremen's Act contains no cross reference to the Extension Act. The Extension Act was enacted on June 19, 1948. On June 24, 1948 Congress enacted Public Law No. 757 (62 Stat. 602) — a bill to increase certain benefits payable under the Longshoremen's Act in view of the increase in wages and cost of living since the original passage of the Act in 1927. Nowhere in the legislative history of this amendment is there any reference to any possible extension of coverage under

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"caused by a vessel on navigable water." The complete coverage urged by those seeking provisions covering "the contract, cover[ing] the job and not simply the man when he is on the ship" would still not be effectuated.

the Longshoremen's Act by the possible passage of the co-pending Extension Act. (1948 U.S. Code, Cong. Serv., Volume 2, pages 1979-1984.)

Thirdly, administrative interpretations of the Longshoremen's Act, while of course not controlling, are not without significance. The Bureau of Employees Compensation of the United States Department of Labor which has been charged with administering the Longshoremen's Act since it was passed, has consistently construed it as not applying to injuries occurring upon a wharf. Opinion No. 16, 1927 A.M.C. 1855. The court is advised that the Bureau still construes the Act as not covering injuries which occur wholly upon a wharf.

Fourthly, the Department of Justice which at one point urged that the Extension Act extended the coverage afforded by the Longshoremen's Act has now retreated from that position. In a recent case, *Michigan Mutual Liability Company v. Arrien*, D.C. S.D. N.Y. 1964, 233 F. Supp. 496, the brief submitted in the District Court by the Department of Justice on behalf of the Deputy Commissioner raised the issue of the impact of the Extension Act upon the coverage of the Longshoremen's Act. The District Court accepted the approach urged by the government and found an implication in the enactment of the Extension Act that the coverage of the Longshoremen's Act had been expanded to embrace certain shoreside injuries. The case was appealed. The holding of the United States Court of Appeals for the Second Circuit will be discussed, *infra*, at page 29, footnote 7. In the appellate brief submitted by the Department of Justice on behalf of the Deputy Commissioner of the Second Compensation District, the government has taken the position that as the accident involved in that case occurred on a "skid", a removable wooden rectangular platform, approximately 6' by 10' which was attached to the wharf and extended over the navigable waters to the vessel it was an accident occurring upon the navigable waters of the United States and the Department of Justice has abandoned any reliance upon the argument made in the court below that the enactment

of the Extension Act had by implication expanded the coverage of the Longshoremen's Act. In its brief submitted in the instant case, the Department of Justice notes that the Longshoremen's Act is not as far reaching "as the burgeoning maritime tort jurisdiction which has been extended shoreward by such laws as the Jones Act and the Extension Act" and, accordingly concludes that "whatever incursions onto the land may have been permitted by specific legislation or case law, any attempt in the instant case to conform artificially the phrase 'upon the navigable waters of the United States' to fit land injuries such as those with reference to piers, wharves, etc. would be to sanction judicial legislation. A new meaning would have to be given to the quoted phrase." (Memorandum submitted by the Department of Justice on behalf of respondent Deputy Commissioner, page 9.)

Fifthly, in House Report No. 2287, dated July 28, 1958, submitted some ten years after the enactment of the Extension of Admiralty Jurisdiction Act of 1948, the Congressional understanding that injuries upon wharves and other extensions of land are not within the coverage of the Longshoremen's Act was evidenced by the following comment:

"The Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424; 33 U.S.C. 901 et seq.), provides compensation for injuries suffered by longshoremen, ship repairmen, ship servicemen, and workers in related employment when they are working for private employers within the federal maritime jurisdiction *on the navigable waters of the United States*, including drydocks. *These employees are subject to the protection of State safety standards when performing work on docks and in other shore areas.*

\* \* \* \* \*

"The Longshoremen's and Harbor Workers' Compensation Act was passed in 1927 as a result of Supreme Court decisions holding that the States could not apply their workmen's compensation laws in an

area which was exclusively maritime and that Congress could not lawfully delegate this authority. Amendments to improve the compensation features of the act and bring it up to date have been made in subsequent years. However, the act had never been amended to authorize the establishment of an effective safety program." (1958 U.S. Code, Cong. and Adm. News, Volume 2, pages 3844-3845; emphasis supplied.)

Thus, there is no indication in any of the legislative history pertaining to the Longshoremen's Act either before, at the time of, or after the passage of the Extension Act that the Extension Act was intended in any way to affect the scope of coverage of the Longshoremen's Act. The administrative interpretations by the Department of Labor of the Longshoremen's Act and the construction presently given that act by the Department of Justice do not support a conclusion that the Extension Act was meant to have any, or had any, impact upon the Longshoremen's Act. Even Judge Edmund L. Palmieri in *Michigan Mutual Liability Company v. Arrien*, D.C. S.D. N.Y. 1964, 233 F. Supp. 496, 501, although finding the Extension Act "illuminating" as to the proper construction to be given to the words "upon the navigable waters" as used in the Longshoremen's Act, noted that the Extension Act "was not an express amendment of the Longshoremen's Act." What claimants then in effect are asking this court to do, advancing arguments almost identical to those urged in 1927 upon Congress (and rejected by it) to the effect that the Longshoremen's Act "should cover the contract, cover the job and not simply the man when he is on the ship", is to hold that the Extension Act sub silentio by implication repealed in 1948 the coverage provisions of the Longshoremen's Act, twenty-one years after its original enactment, and re-enacted the coverage provisions with amendments so as to extend coverage to certain shoreside injuries not previously embraced within the Longshoremen's Act. To so hold would be but the grossest type of judicial legislation, an activity in which this court is not authorized to, and in any event declines to, engage.

The legislative history of the Extension Act itself makes it abundantly clear that Congress in drafting the Extension Act was merely extending the traditional admiralty jurisdiction to include damage occasioned by a vessel situated on navigable waters to person or property situated upon land, such causes of action theretofore having been maintainable only on the common law side. The bill did not attempt to, nor intend to, create new causes of action. House Report No. 1523 describes the effects of the bill as follows:

"Under existing law, admiralty and maritime jurisdiction in respect of claims arising out of maritime torts is extended by the United States courts to only those cases where injury is done upon navigable waters, and not to those where injury is done to persons or property situated upon land, even though the injury is caused by a vessel situated on navigable waters. For example, if a bridge or pier, or any person or property situated thereon, is injured by a vessel, the admiralty courts of the United States do not entertain the claim for the damages thus caused. *Cleveland Terminal & Valley R.R. Co. v. Cleveland S.S. Co.* (208 U.S. 316); *The Troy* (208 U.S. 321); *Martin v. West* (222 U.S. 191). The bill under consideration would provide for the exercise of admiralty and maritime jurisdiction in all cases of the type above indicated.

"As a result of the denial of admiralty jurisdiction in cases where injury is done on land, when a vessel collides with a bridge through mutual fault and both are damaged, under existing law the owner of the bridge, being denied a remedy in admiralty, is barred by contributory negligence from any recovery in an action at law. But the owner of the vessel may by a suit in admiralty recover half damages from the bridge, contributory negligence operating merely to reduce the recovery. Further, where a collision between a vessel and a land structure is caused by the fault of a compulsory pilot, the owner of the land structure is without remedy for his injuries since at law a compulsory pilot is not deemed the servant of the vessel's

master or owner. *Homer Ramsdell Transportation Co. v. Compagnie Generale Transatlantique* (182 U.S. 406, 416). But if the vessel sheers off the land structure to collide with another vessel in the vicinity, the owner of the second vessel, by an in rem proceeding in admiralty, may recover full damages, for the wrong is viewed as that of the vessel itself and compulsory pilotage is no defense. *The China* (74 U.S. 53, 68). The bill under consideration would correct these inequities as a result of providing that the admiralty courts shall take cognizance of all of them.

"The bill will bring United States practice respecting maritime torts into accord with that followed by the British, who by a series of statutes, beginning in 1840, have restored admiralty jurisdiction in situations of this character and brought the British law into harmony with that of most European countries.

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"Adoption of the bill will not create new causes of action." (1948 U.S. Code, Cong. Serv., Volume 2, pages 1899, 1900.)

The legislative history of the Extension Act does not suggest but rather strongly negates any intention on the part of Congress to repeal and then re-enact with amendments the coverage provisions of the Longshoremen's Act. As shown by this history, quoted in part above, the Extension Act was passed to cure inequities arising when a vessel on navigable waters caused damage or injury on land. This statement is made by the court with full awareness that the Supreme Court of the United States has found nothing in the legislative history of the Extension Act to require that the language of the statute itself be given too restrictive an interpretation. (*Gutierrez v. Waterman Steamship Corp.*, 1963, 373 U.S. 206, 83 S. Ct. 1185, 10 L. Ed. 2d 297.)

Turning next to the express wording of the Extension Act itself, it can be seen that the wording of that enactment is peculiarly inapplicable to a bill extending coverage



under a workmen's compensation act. The Extension Act, Title 46, U.S.C.A., section 740, provides:

"The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."

Most significantly, the statute then continues:

"In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable waters."

What then has Congress said? To paraphrase the second paragraph of the statute quoted above — in any case where the admiralty jurisdiction of the United States has been extended to a land injury to person or *property*, suit to recover damages may be brought in rem or in personam according to the principles of law and rules of practice applicable if the injury or damage had occurred on navigable waters. Damage to property is never the subject matter of a workmen's compensation act. A proceeding before the Deputy Commissioner under the Longshoremen's Act is not a suit. A suit is not brought but rather the Act provides for a claim to be filed. The proceeding is not one in rem or in personam. It is an administrative proceeding commenced with the filing of a claim with an administrative officer, it is conducted in accordance with administrative principles and rules and it terminates not in a judgment enforceable in rem or in personam but terminates with the rendering of an administrative order rejecting the claim or making an award. The Extension Act clearly contemplates the extension of admiralty jurisdiction over a suit based on tort liability to recover damages. The Longshoremen's Act on the contrary sets up an administrative proceeding to obtain compensation without regard to tortious conduct, and with no provision for reduction of "damages" for contributory or comparative



negligence. The two statutes do not deal with the same subject matter, are inherently inconsistent with each other, and cannot be read as being in *pari materia*. The court finds nothing within the four corners of the Extension Act itself to indicate any Congressional intent to amend the jurisdictional test of the occurrence of an injury upon the navigable waters of the United States as that requirement specifically appears within the coverage provisions of the Longshoremen's Act. Indeed the wording of the Extension Act is peculiarly inapplicable to any situation involving an injury to be compensated for by way of a workmen's compensation act.

The decisions rendered since the enactment of the Extension Act merit discussion but lead to no different conclusion. Cases, upon which claimants rely, pertaining to Jones Act (46 U.S.C.A., section 688) liability are not in point for the responsibility of the employer to his seaman-employee thereunder is not circumscribed by any jurisdictional requirement that the situs of the injury be upon the water. The sole jurisdictional requirement is injury in the course of a seaman's employment. Similarly, cases of unseaworthiness liability for land injuries are inapposite for as succinctly pointed out by the Supreme Court of the United States in *Gutierrez v. Waterman Steamship Corp.*, 1963, 373 U.S. 206, 214, 83 S. Ct. 1185, 10 L. Ed. 2d 297, allowing recovery to a longshoreman against a vessel for injuries incurred on land and caused by the ship's unseaworthiness, "the tort of unseaworthiness arises out of a maritime status or relation and is therefore 'cognizable by the maritime [substantive] law whether it arises on sea or on land' [*Strika v. Netherlands Ministry of Traffic*, 2 Cir. 1950, 185 F. 2d 555, 558]." Since the cause of action in unseaworthiness arises under the general maritime law and not under a specific enactment such as the Longshoremen's Act, the general admiralty and maritime jurisdictional provisions are controlling and the Extension Act accordingly comes into play. Finally, cases concerned with a seaman's maintenance and cure should be distinguished from cases arising under the Longshoremen's Act, for liability for the care of a seaman is independent of the

situs of the injury and is instead a liability depending upon and arising out of the contractual relationship between the parties.

Aside from these totally inapplicable cases, claimants urge upon the court that the following broad and general language appearing in *Calbeck v. Travelers Insurance Co.*, 1962, 370 U.S. 114, 124, 82 S. Ct. 1196, 8 L. Ed. 2d 368, indicates that the coverage of the Longshoremen's Act may, and indeed must, be extended by judicial interpretation to land injuries:

"In sum, it appears that the Longshoremen's Act was designed to ensure that a compensation remedy existed for all injuries *sustained* by employees on *navigable waters*, and to avoid uncertainty as to the source, state or federal, of that remedy. Section 3(a) should, then, be construed to achieve these purposes. Plainly, the Court of Appeals' interpretation, fixing the boundaries of federal coverage where the outer limits of state competence had been left by the pre-1927 constitutional decisions, does not achieve them." (Emphasis supplied.)

No support for claimants' position may be found in this excerpt and, indeed, the case as a whole is squarely against claimants. First, the quotation above contains the specific jurisdictional language "on navigable waters". Secondly, the term "on navigable waters" as the *sine qua non* of jurisdiction is used in the opinion at least eleven times.<sup>6</sup> Thirdly, it should be noted that under the facts of the *Calbeck* case the injuries indisputably occurred on navigable waters. The sole issue before the court was whether or not a court-made distinction (having been made prior to the passage of the Longshoremen's Act) that state compensation statutes could constitutionally be applied to employees engaged in the completion of a launched vessel under construction on navigable waters but could not constitutionally be applied to employees engaged in repair

<sup>6</sup> See pages: 115, 116 (twice) 117, 119, 120, 124, 125, 126, 129 (twice).

work on completed vessels on navigable waters was still valid after passage of the act so as to exempt from federal coverage employees engaged in construction as distinguished from repair work. The Supreme Court held that such judge-made law was not in accord with the intent evidenced by Congress's enactment of the Longshoremen's Act to extend coverage to all injuries sustained on navigable waters. The Supreme Court did not say that by judicial legislation the courts may amend the express jurisdictional requirements of the Longshoremen's Act.

There have been several cases in which the question of the effect of the Extension Act upon the Longshoremen's Act has been raised. In *Gladden v. Stockard Steamship Company*, 3 Cir. 1950, 184 F. 2d 510, the court took the position that it was not necessary for it to consider and rule upon the issue, stating that the result as far as the plaintiff was concerned would be the same were the tort considered a maritime tort or a terrestrial tort as the plaintiff's action against the decedent's employer would be barred by the "exclusive" remedy provision of the Longshoremen's Act were the tort maritime or by the "exclusive" remedy provision of the state workmen's compensation act were it a terrestrial tort. In *Interlake Steamship Company v. Nielsen*, 6 Cir. 1964, 338 F. 2d 879, 882, the court, recognizing that the Extension Act "obviously was not designed directly to affect the Longshoremen's and Harbor Workers' Compensation Act", felt that the Extension Act and the trend of case law "all pointed in the direction of expanding the boundaries of admiralty jurisdiction towards land." The court then proceeded specifically to hold that a claimant killed by physically coming into contact with frozen navigable waters by breaking his skull on such waters suffered an injury occurring "on the navigable waters of the United States" and thus his death was compensable under the Longshoremen's Act. This case is certainly not authority for the proposition that a land injury is compensable under the Longshoremen's Act. Judge Harrison L. Winter of this court has likewise recognized the tendency to expand admiralty jurisdiction and in so doing has specifically noted the *Calbeck* case

and the Extension Act. Again his specific holding was that the injury occurred upon navigable waters.

"I do not have any question in my mind but that this accident did occur upon navigable waters of the United States in the sense that the decedent was on the GUAM, which was, although run aground, in the Patapsco River and the Patapsco River is admittedly navigable." (Boston Metals Company v. O'Hearne, D.C. D. Md 1963, Admiralty No. 4412 — oral opinion.)

On appeal, the United States Court of Appeals for the Fourth Circuit affirmed stating "since Harris received his injuries on navigable waters, we agree with the District Judge that Calbeck is controlling in this case." (Boston Metals Company v. O'Hearne, 4 Cir. 1964, 329 F. 2d 504, 507.)

The effect, if any, of the Extension Act upon the Longshoremen's Act where the injury occurred upon a dock or pier, as distinguished from an injury occurring upon navigable waters, was raised and was considered in Atlantic Stevedoring Company v. O'Keeffe, D.C. S.D. Ga. 1963, 220 F. Supp. 881, 885, where the court after a careful study of the two acts and their respective legislative histories, stated:

"I find nothing to lead me to the conclusion that Congress intended by the Admiralty Extension Act to broaden and enlarge the jurisdiction of the Longshoremen's and Harbor Workers' Act, and I do not believe such jurisdiction can, or should be, extended by implication."

Judge Walter E. Hoffman in *Revel v. American Export Lines*, D.C. E.D. Va. 1958, 162 F. Supp. 279, 283-284 (likewise a pier case), after a careful analysis of the issues involved, concluded:

"\* \* \* To oust state compensation acts from an established and important area of coverage by reason of the passage of the Extension in Admiralty Act, which makes no reference to the field of compensation

law, would create a situation in which a long-shoreman, such as the plaintiff herein, would not be covered by any workmen's compensation act, state or federal, as the federal covers only those injuries occurring 'upon the navigable waters', 33 U.S.C.A. § 903(a), and it is established that injuries suffered on piers or docks (as opposed to drydocks) are not included. It can hardly be said that the Extension in Admiralty Act was also intended to amend the federal compensation act to include injuries occurring on land as well as 'upon the navigable waters', and this is especially true when the Supreme Court has said, 'Congress made clear its purpose to permit state compensation protection wherever possible.' *Davis v. Department of Labor and Industries*, 317 U.S. 249, 252, 63 S. Ct. 225, 227, 87 L. Ed. 246. See also *United States Casualty Co. v. Taylor*, 4 Cir., 64 F. 2d 521, 524; *Traveler Ins. Co. v. McManigal*, 4 Cir., 139 F. 2d 949, 951; both opinions by Judge Soper, cf. *Gladden v. Stockard S.S. Co.*, 3 Cir., 184 F. 2d 510."

On appeal, the United States Court of Appeals for the Fourth Circuit in effect affirmed Judge Hoffman, saying:

"Since Revel was injured while standing on the dock (an extension of the land), his remedies are restricted to those afforded by the local law. *Swanson v. Marra Bros.*, 1946, 328 U.S. 1, 66 S. Ct. 869, 90 L. Ed. 1045; *State Industrial Comm. v. Nordenholt Corp.*, 1922, 259 U.S. 263, 42 S. Ct. 473, 66 L. Ed. 933; Cf. *The Longshoremen's and Harbor Workers' Compensation Act*, 33 U.S.C.A., § 903 and *Kermarec v. Compagnie Generale Transatlantique*, 1959, 358 U.S. 625, 79 S. Ct. 406, 3 L. Ed. 2d 550. *This is true even though the Congress has embraced such cases within the maritime jurisdiction of the United States.* Extension of Admiralty Act, 46 U.S.C.A., § 740." (*American Export Lines, Inc. v. Revel*, 4 Cir. 1959, 266 F. 2d 82, 84; emphasis supplied.)

This court is in complete accord with the conclusion that, although certain types of land injuries have, by the

enactment of the Extension Act, been embraced within the admiralty and maritime jurisdiction of the United States, the specific jurisdictional requirement of the Longshoremen's and Harbor Workers' Compensation Act that to come within the latter act the injury must occur upon the navigable waters of the United States has not been repealed and re-enacted with amendments by implication through the passage of the Extension Act. However, even were this court not in agreement<sup>7</sup> with the pronouncement of the United States Court of Appeals for the Fourth

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<sup>7</sup> Although having high regard for its author, the one reported case known to this court, and previously discussed (*Michigan Mutual Liability Company v. Arrien*, D.C. S.D. N.Y. 1964, 233 F. Supp. 496), equating "upon the navigable waters of the United States" with "admiralty jurisdiction" due to the "illumination" by implication of the Extension Act is completely unpersuasive to this court both in its reasoning and because of its failure to consider and meet the factors relied upon and found controlling in the earlier "pier" cases ruling on this issue, namely, the *Atlantic Stevedoring Company* case and the *Revel* case, excerpts of which have been quoted just previously in the text above. In addition it should be noted that the *Michigan Mutual* case was not a pier case. The injury occurred upon a removable staging or skid, a situation which the deputy commissioner in effect found to be, and which the Department of Justice now urges is, comparable to a gangplank or ladder situation. An injury upon a gangplank or ladder has long been held to be within the coverage of the Longshoremen's Act. (*Ford v. Parker*, D.C. D.Md. 1943, 52 F. Supp. 98, an opinion by the late Judge W. Calvin Chesnut).

Since this opinion was drafted the United States Court of Appeals for the Second Circuit has held the injury in the *Michigan Mutual* case compensable under the Longshoremen's Act on the ground that the skid more closely resembled a gangway than a pier, thus retaining and applying the established distinction between injuries occurring upon navigable waters and injuries occurring upon extensions of land such as piers or wharves. The Second Circuit rejected rather than adopted the lower court's equation of "upon navigable waters" with "admiralty jurisdiction". (*Michigan Mutual Liability Co. v. Arrien*, 2 Cir. 1965, 344 F. 2d 640, 645 — footnote 3). Circuit Judge Paul R. Hays, dissenting on another ground, specifically noted that "[w]hen Congress adopted the Admiralty Extension Act it had an opportunity to expand federal compensation to cover all longshoremen's injuries caused in loading and unloading vessels. Congress did not take advantage of that opportunity." (344 F. 2d 640, 648-649).

Circuit, it would consider itself bound by the excerpt quoted above.

Accordingly, this court holds that the compensation order denying compensation benefits and complained of in Admiralty No. 4704, and the compensation order denying compensation benefits and complained of in Admiralty No. 4705, are in accordance with the law. Judgment is hereby entered in favor of the respondent Deputy Commissioner in both of the aforesaid cases and the complaints in both cases are hereby dismissed without costs.

R. DORSEY WATKINS,  
United States District Judge.

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COMPENSATION ORDER OF DEPUTY COMMISSIONER JERRY C.  
OOSTING, FILED AT NORFOLK, VIRGINIA, FEBRUARY 10, 1965.

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United States Department of Labor  
Bureau of Employees' Compensation  
Fifth Compensation District

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Case No. 2-2831

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*In the matter of the claim for compensation under the  
Longshoremen's and Harbor Workers'  
Compensation Act.*

*Albert Avery,*

*Claimant,*

*v.*

*Old Dominion Stevedoring Corporation,*  
*Employer,*

*Liberty Mutual Insurance Company,*  
*Insurance Carrier.*

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Such investigation in respect to the above entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following



## FINDINGS OF FACT

That on the 28th day of December 1961 the claimant above named was in the employ of the employer above named at Norfolk, in the State of Virginia, in the Fifth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by the Liberty Mutual Insurance Company; that on said day the claimant was employed as a longshoreman for the employer and assigned with other members of the work gang to an open type railroad car where they were engaged in hooking up logs, such logs being hoisted from the railroad car by means of ship's gear and loaded onto the ship, which vessel was afloat in the Elizabeth River, Norfolk, Virginia; that while a log was being lifted from the railroad car by means of the ship's gear, the claimant was struck by a log or logs while the log or logs were attached to the ship's gear crushing him against the side of the railroad car, resulting in fracture of transverse processes of lumbar vertebrae and internal injuries; that the railroad car on which the injury was sustained was on Pier B, City Piers; that the pier is the traditional or usual type structure existing in the Norfolk area; that the pier is attached to the land at one end and it juts outward and over the waters of the Elizabeth River; that the injury had its inception and culmination on the railroad car which was on the surface of the pier; that the pier due to its connection to the land is an extension of the land; that written notice of injury was not given within thirty days but that the employer had knowledge of the injury and has not been prejudiced by failure to receive such written notice; that the employer furnished the claimant with medical treatment, etc., in accordance with Section 7(a) of the Act; that the average weekly wage of the claimant at the time of his injury was \$68.07; that the accident of 28 December 1961 does not constitute an injury occurring upon the navigable waters of the United States (including any dry dock) and is excluded under the provisions of Section 3(a) of the Act; that the Industrial Commission of Virginia, pursuant to



the terms of the Workmen's Compensation Law of Virginia, awarded compensation to the claimant at the rate of \$32.40 per week for the period from 28 December 1961 to 12 July 1962.

Upon the foregoing findings of fact it is ordered by the Deputy Commissioner that the claim be and it is hereby **REJECTED** for the reason that the injury sustained by the claimant on 28 December 1961 did not occur upon the navigable waters of the United States (including any dry dock) within the meaning of the Longshoremen's and Harbor Workers' Compensation Act.

Given under my hand and filed at Norfolk, Virginia this 10th day of February 1965.

JERRY C. OOSTING,

Deputy Commissioner,  
Fifth Compensation District.

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OPINION OF UNITED STATES DISTRICT COURT FOR THE EASTERN  
DISTRICT OF VIRGINIA, NORFOLK DIVISION, FILED  
AND ENTERED SEPTEMBER 10, 1965.

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In the United States District Court for the Eastern  
District of Virginia, Norfolk Division

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Civil Action No. 4798

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John W. East,

Petitioner,

v.

Jerry C. Oosting, Deputy Commissioner, United States  
Employees' Compensation Commission, Fifth  
Compensation District,

Respondent,

United States Lines Company and The Travelers  
Insurance Company,

Intervenors.

Civil Action No. 4976

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Albert Avery,

Petitioner,

v.

Jerry C. Oosting, Deputy Commissioner, United States  
Employees' Compensation Commission, Fifth  
Compensation District,

Respondent,

Liberty Mutual Insurance Company,

Intervenor.

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### MEMORANDUM

In substantially identical actions each of petitioners seeks a trial *de novo* on the jurisdictional issue, and further requests the entry of an order setting aside the findings of the Respondent Deputy Commissioner, which were to the effect that the injury in each case did not occur upon the navigable waters of the United States within the meaning of the Longshoremen's and Harbor Workers' Compensation Act.

The two cases have not been consolidated for trial or hearing, but the governing principles in each case are essentially the same and are the subject of this joint memorandum for the convenience of the Court. However, separate orders should be entered and, if appeals are noted, separate notices of appeal should be filed.

In *East*, the petitioner was an employee of the United States Lines Company on June 17, 1963. The employer was engaged in maritime employment on the navigable waters of the United States and, at the time in question, had a verbal agreement with Whitehall Terminal Corporation, a stevedoring concern, to discharge cargo from the S.S. AMERICAN PRESS which was moored on the north side of pier No. 2, Army Base; the pier being owned by the Department of Commerce, Maritime Commission, but the

north side being leased to Whitehall Terminal Corporation. The pier is 334 feet wide and projects out over the Elizabeth River at an approximate right angle from the land a distance of 1328 feet. The pier is supported by piles sunk into the river bed. There is a shed on the pier covering a distance of 1280 feet, the first 500 feet being two stories high. The width of the apron of the pier at the extreme offshore end is 40 feet, and on the north side is 36 feet. The depth of the water at mean low water off the end of the pier is from 30 to 35 feet and along the north side of the pier's apron is 30 feet. While not in the finding of the Deputy Commissioner, the parties have stipulated that there was water under the pier of sufficient depth to permit a small barge or a small launch or rowboat to go between the pilings. It is further agreed that no cargo boat could go under the pier. The pier is attached and connected to the land and, as such, is an extension of land. East was employed as a cargo checker and, at times, it became necessary for him to board vessels. On the day in question East was assigned to check cargo on the north side of Pier No. 2, adjacent to the No. 5 hatch of the AMERICAN PRESS, as the cargo was discharged from the hatch. While checking cargo *under the shed*, he was struck on the leg by a bale of wool which had fallen off a fork lift being operated by an employee of Whitehall. Thus he was on the surface of the pier when he sustained his injury. He was awarded compensation benefits under the Workmen's Compensation Act of Virginia, but the Deputy Commissioner rejected East's claim for benefits under the Longshoremen's and Harbor Workers' Act as the injury sustained did not occur upon the navigable waters of the United States (including any dry dock).

In *Avery*, the petitioner was an employee of Old Dominion Stevedoring Corporation in the capacity of longshoreman at the time of his injury on December 28, 1961. He was assigned, together with other members of the work gang, to an open type railroad car and was engaged in hooking up logs which, in turn, were being hoisted from the railroad car by means of the ship's gear and loaded onto the vessel which was afloat in the Elizabeth River. While

a log was being lifted from the railroad car by the ship's gear, petitioner was struck by one or more logs so attached to the vessel's gear, thereby crushing him against the side of the railroad car. The railroad car in question was on the surface of Pier B, City Piers, which is a usual type structure existing in the Norfolk area. The pier is attached to land at one end and extends outward and over the waters of the Elizabeth River, thereby becoming an extension of land. Avery was awarded compensation benefits under Workmen's Compensation Act of Virginia, but the Deputy Commissioner rejected his claim for benefits under the Longshoremen's and Harbor Workers' Act as the injury sustained did not occur upon the navigable waters of the United States (including any dry dock).

In both cases the injury occurred on a pier. In *East*, it took place under a shed on a pier. In *Avery*, the injury was apparently on the apron area as there is no suggestion of any shed on the pier in question. Moreover, in *Avery*, the injury occurred as a result of an actual loading operation while the ship's gear was attached to logs being hoisted from a railroad car. We do not believe that these minor differences create any contrary rule to the well-established principle of law and the actions of the Deputy Commissioner are approved and affirmed, thus calling for a denial of each petition and a judgment for the respondent in each case.

Initially we may dispose of petitioners' contentions that they are entitled to a trial *de novo* on the jurisdictional issue. Our views on this subject have been previously discussed in *Dixon v. Oosting*, E.D. Va., 238 F. Supp. 25, and we adhere to this ruling. In short, a trial *de novo* on the issue of jurisdictional facts is not mandatory but is a matter of discretion.

We will not repeat the familiar rule that findings of the Commissioner are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole, *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504, or "unless they are irrational," *O'Keeffe v. Smith Associates*, 380 U.S. 359. We recognize these principles as the scope of judicial review.

The main thrust of petitioners' argument is that the water under the pier is sufficient to constitute navigable waters of the United States and, therefore, the injury is compensable under the federal act. From time immemorial piers, docks, wharves and other like structures, which are firmly attached to the land and extend over navigable waters, have been deemed to be extensions of the land, and injuries suffered thereon are compensable only under state compensation laws. *Swanson v. Marra Bros.*, 328 U.S. 1; *Americican Export Lines, Inc. v. Revel*, 4 Cir., 256 F. 2d 82; *Hastings v. Mann*, 4 Cir., 340 F. 2d 910, cert. den. 380 U.S. 963. If, of course, the damage is caused by a vessel, the Extension of Admiralty Act, 46 U.S.C., § 740, becomes effective but this is clearly not the situation in *East*. As to *Avery*, it is argued that, while the injury was sustained on the pier, the log or logs were attached to the ship's gear and, therefore, the Admiralty Extension Act of 1948 is applicable. However, the legislative history does not suggest that Congress intended to broaden the coverage afforded by the Longshoremen's and Harbor Workers' Act. Sen. Rep. No. 1593, H.R. No. 1523, 80th Cong., 2nd Sess., 1948, 2 U. S. Code, Cong. & Adm. News 1898. Judicial decisions, even since the landmark case of *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, similarly hold that the coverage is not extended by the Admiralty Extension Act. *Interlake Steamship Company v. Nielsen*, 6 Cir., 338 F. 2d 879, 882; *Hastings v. Mann*, *supra*.

The recent case of *Michigan Mutual Liability Co. v. Arrien*, 2 Cir., 344 F. 2d 640, is especially pertinent in holding that the point of injury is essentially decisive. While the ruling in *Arrien* upheld an award under the Longshoremen's and Harbor Workers' Act, the injured longshoreman was knocked off a temporary "skid" which extended from the pier to the vessel. In declining to analogize a temporary skid to a wharf, Circuit Judge Kaufman said:

"A wharf or pier is usually built on pilings over what was navigable water. When the structure is completed, the water over which it is built is permanently removed from navigation as if the structure had been in the first instance built on land."

We are unable to predict what may be forthcoming in considering the extension of coverage under the Longshoremen's and Harbor Workers' Act. However, it is abundantly clear that the Senate Judiciary Committee, in considering the matter in 1927, definitely noted that injuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship. Sen. Rep. 973, 69th Cong., 1st Sess., p. 16.

The fact that, in *East*, the cargo checker occasionally boarded the vessel in the performance of his duties fails to impress us. While it may appear inconsistent to compensate a cargo checker injured aboard a vessel under the federal act and, at the same time, deny him such benefits if injured while on the pier, any recourse is through legislative action by way of amendment to the act.

We do not believe that the *Calbeck* case has materially altered prior rulings as applied to the facts of the two cases now before the Court. *Calbeck* did not involve an injury on a pier; it was concerned with coverage for injuries on a new vessel under construction and afloat upon navigable waters. Moreover, in footnote 10 (370 U.S. 121) Mr. Justice Brennan quotes the language set forth above in the Senate Report which expressly excluded coverage for injuries occurring in loading or unloading "unless they occur on the ship or between the wharf and the ship so as to bring them within the maritime jurisdiction of the United States."

The question presented is not new in the Fourth Circuit. Prior to *Calbeck*, Judge Sobeloff had occasion to comment upon the status of a longshoreman injured on a dock when a drum fell from the ship and rolled along the pier striking him. While the Fourth Circuit held that the longshoreman was not precluded from recovery against the shipowner by reason of the acceptance of state compensation benefits, it also pointed out in *American Export Lines, Inc. v. Revel*, supra, at p. 84, that:

"Since Revel was injured while standing on the dock (an extension of the land) his remedies are restricted to those afforded by local law. . . . This is true even

though the Congress has embraced such cases within the maritime jurisdiction of the United States. Extension of Admiralty Act, 46 U.S.C.A., § 740."

And in *Hastings v. Mann*, supra, a decision subsequent to *Calbeck*, the Fourth Circuit again said:

"... [I]t has been uniformly held that piers, docks, wharfs and similar structures extending over navigable waters are extensions of land, though their use and purpose be maritime. Damage to such structures and personal injuries suffered by persons while upon such structures are not compensable in Admiralty, unless, under the 1948 Act, caused by a vessel on navigable waters."

Other circuits have consistently held that persons injured upon a pier are restricted to compensation benefits under state law. *Hagans v. Ellerman & Bucknall S.S. Co.*, 3 Cir., 318 F. 2d 563; *Delaney v. Towmotor Corp.*, 2 Cir., 339 F. 2d 4; *Kent v. Shell Oil Co.*, 5 Cir., 286 F. 2d 746.

The *Avery* case concededly is stronger than *East* as it is at least arguable that *Avery's* injury was caused by a vessel on navigable water, notwithstanding that such injury was consummated on land, and hence is covered by the Extension of Admiralty Jurisdiction Act of 1948. The difficulty with *Avery's* contention is that he seeks to equate the terms "admiralty and maritime jurisdiction," as stated in the Act of 1948, with the jurisdictional requirement of the occurrence of the injury "upon the navigable waters" as provided in the Longshoremen's and Harbor Workers' Act. The question was answered by this Court in *Revel v. American Export Lines*, E.D. Va., 162 F. Supp. 279, 283-284, aff'd 4 Cir., sub. nom. *American Export Lines v. Revel*, 266 F. 2d 62, 84. But the *Avery* case is identical with *Johnson v. Traynor, Deputy Commission*, 243 F. Supp. 184, 34 L.W. 2001, decided by Judge R. Dorsey Watkins for the District of Maryland on June 22, 1965. The exhaustive opinion of Judge Watkins cogently points to the reasons why the Admiralty Extension Act of 1948 did not amend

the Longshoremen's and Harbor Workers' Act. We adopt the reasoning of the *Johnson* case and concur in this finding, thus disposing of the *Avery* case on the same basis as *East*.

Present orders in accordance with this memorandum.

/s/ WALTER E. HOFFMAN,

United States District Judge.

Norfolk, Virginia

September 10, 1965

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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE  
FOURTH CIRCUIT, FILED AND ENTERED JUNE 20,  
1968, REPORTED AT ..... F. 2d .....

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United States Court of Appeals  
for the Fourth Circuit

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No. 10,060

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Marine Stevedoring Corporation, and Liberty Mutual  
Insurance Company,

Appellants,

versus

Jerry C. Oosting, Deputy Commissioner, United States  
Employees' Compensation Commission, Fifth  
Compensation District,

Appellee.

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Appeal from the United States District Court for the  
Eastern District of Virginia, at Norfolk. Walter  
E. Hoffman, District Judge.



41a

No. 10,298

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William H. Johnson,

Appellant,

versus

John P. Traynor, Deputy Commissioner, U. S. Department  
of Labor, and Nacirema Operating Co., Inc.,  
a body corporate,

Appellees.

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No. 10,299

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Julia T. Klosek, widow of Joseph T. Klosek,  
deceased employee,

Appellant,

versus

John P. Traynor, Deputy Commissioner, U. S. Department  
of Labor, and Nacirema Operating Co., Inc.,  
a body corporate,

Appellees.

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Appeals from the United States District Court for the  
District of Maryland, at Baltimore. R. Dorsey  
Watkins, District Judge.

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No. 10,323

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Albert Avery,

Appellant,

versus

Jerry C. Oosting, Deputy Commissioner, United States  
Employees' Compensation Commission, Fifth Compens-  
ation District, and Liberty Mutual Insurance  
Company,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Walter E. Hoffman, District Judge.

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(Reargued February 5, 1968

Decided June 20, 1968.)

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Before HAYNSWORTH, Chief Judge, SOBELOFF, BOREMAN, BRYAN, WINTER, CRAVEN and BUTZNER, Circuit Judges, sitting en banc.

No. 10,060. L. S. Parsons, Jr., (John A. Field, III, and Parsons and Powers on brief) for Appellants, and Leavenworth Colby, Attorney, Department of Justice, (John W. Douglas, Assistant Attorney General, Morton Hollander, Attorney, Department of Justice, on brief) for Appellee.

Nos. 10,298 and 10,299. Jno. J. O'Connor, Jr., (O'Connor and Preston on brief) for Appellants, and Leavenworth Colby, Attorney, Department of Justice, (John W. Douglas, Assistant Attorney General, and David Rose, Attorney, Department of Justice, on brief) for Appellee Traynor, and Randall C. Coleman (Thomas W. Jamison, III, on brief) for Appellee Nacirema. Jacob Rassner on brief for International Longshoremen's Association as Amicus Curiae.

No. 10,323. Ralph Rabinowitz (Kelsey & Rabinowitz on brief) for Appellant, and Leavenworth Colby, Attorney, Department of Justice, (John W. Douglas, Assistant Attorney General, and David Rose, Attorney, Department of Justice, on brief) for Appellee Oosting, and William B. Eley (Rixey and Rixey on brief) for Appellee Liberty Mutual. Jacob Rassner on brief for International Longshoremen's Association as Amicus Curiae.

**SOBELOFF, Circuit Judge:**

The common question presented by these cases consolidated for appeal<sup>1</sup> is whether injuries sustained by four longshoremen while working on the docks and engaged in three separate loading operations are compensable under the Longshoremen's and Harbor Workers' Compensation Act of 1927, 33 U.S.C.A. § 901 et seq. In none of the cases are the facts in dispute; only the intended scope of the Act is contested.

In *Marine Stevedoring v. Oosting*, No. 10,060, a stevedoring company was under contract to handle the lines and cables in moving and mooring the S.S. JAMES E. HAVILAND. Vann, one of its employees, was lifting a cable off the stern bollard when it suddenly straightened, catapulting him off the pier and into the river where he drowned. Death benefits awarded by the deputy commissioner were affirmed by the District Court. 238 F. Supp. 78 (E.D. Va. 1965).

In Nos. 10,298 and 10,299, Johnson and Klosek were members of a longshoremen's "gang" engaged in loading a cargo of steel beams aboard the S.S. BETHTEX, moored to the Bethlehem Steel High Pier, Sparrows Point, Maryland. They had been assigned to the pier to work as "slingers or hook-on men," and it was their job to board the railroad gondola cars used to carry the beams onto the pier and to fasten drafts to the ship's crane in preparation for loading. At the time of the accident, as the crane raised a draft out of the car, it began to rotate. One end of the draft caught Klosek, lifted him from the car and dropped him head first onto the pier, killing him, while the other end struck Johnson and crushed him against the side of the car. The deputy commissioner denied the claim brought by Klosek's widow and also the claim submitted

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<sup>1</sup> After being heard below as three separate cases, they were consolidated on appeal and were initially argued on February 9, 1966 before a panel of the court consisting of Haynsworth, Chief Judge, and Sobeloff, Circuit Judge, and Hutcheson, District Judge. At the request of the court, the cases were reargued en banc.

by Johnson, who had sustained disabling injuries. The District Court affirmed, holding that the injuries had not occurred within the jurisdictional scope of the statute. 243 F. Supp. 184 (D. Md. 1965).

Like Klosek and Johnson, Avery, in No. 10,323, was working as a slinger in a gondola car attaching drafts of logs to a ship's crane for loading. He too was severely injured when a swinging draft pinned him against the side of the car. For the same reasons as in Klosek and Johnson, he was denied relief under the Longshoremen's Compensation Act. The District Court affirmed.

Each of the injured men was a member of a "gang" of approximately twenty assigned by his employer to work on a particular vessel. As was the practice at the ports where these injuries occurred, the entire gang reported to the vessel and two to four of the men were then ordered back onto the pier to work as "slingers or hook-on men" during the loading operation.<sup>2</sup> The job performed by the men on the pier is basically the same as the work done by their fellow longshoremen on board. Indeed, it is not uncommon for the men to rotate positions and continually pass back and forth between ship and wharf during a given operation. Indisputably, at the time of each accident the injured longshoremen were engaged in maritime employment on a high pier at a point several hundred feet from shore. Further, it has been stipulated that the piers in question extended into navigable waters and were sufficiently high to permit the passage of small boats and barges under them.

The Longshoremen's and Harbor Workers' Compensation Act provides in relevant part that:

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<sup>2</sup> At the time of their injuries, both Vann and Avery were employed at the port in Norfolk, Virginia. While the same practice is followed at the Maryland and Virginia ports, it often varies in other sections of the country. At some ports the assignment of men to particular positions is made on the basis of seniority, the most senior workers being assigned to the hold when the weather is bad and to the pier in good weather. At other ports, the men rotate throughout the day.

### "Section 3

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law."

The issue before us is whether an injury on a pier falls within the jurisdictional provision "upon the navigable waters," and thus within the coverage of the Act.

The answer is found in part in the history of this legislation. Ten years before the passage of the Act, the Supreme Court held that longshoremen injured on vessels or on gangplanks between vessels and piers were exclusively within federal maritime jurisdiction and thus barred from recovery under state compensation acts. *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917); *Clyde S.S. Co. v. Walker*, 244 U.S. 255 (1917). Subsequent efforts by Congress to extend the benefits of existing state acts to maritime injuries were struck down as unconstitutional delegations of the legislative powers of Congress.<sup>3</sup> *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Washington v. Dawson & Co.*, 264 U.S. 219 (1924). In its third attempt to provide compensation for the yet uncovered longshoremen, Congress in 1927 enacted the Longshoremen's Compensation Act.<sup>4</sup>

<sup>3</sup> Act of October 6, 1917, 40 Stat. 395; Act of June 10, 1922, 42 Stat. 634.

<sup>4</sup> Congress acted partly in response to the Supreme Court's invitation in *Washington v. Dawson Co.*, *supra* at 227, to exercise its maritime powers in order to provide federal coverage for longshoremen: "Without doubt Congress has power to alter, amend or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general employers' liability law or general provisions for compensating injured employees; but it may not be delegated to the several states."

Denominated "An Act to provide compensation for disability or death resulting from injuries to employees in certain maritime employment," 44 Stat. 1424, the Act embodies a comprehensive compensation plan for all longshoremen engaged in "loading, unloading, refitting, and repairing ships," on navigable waters. S. Rep. No. 973, 69th Cong., 1st Sess., p. 16. As originally drafted, the bill provided coverage for injuries "on a place within the admiralty jurisdiction of the United States, except employment of local concern and no direct relation to navigation or commerce." S. 3170 & H.R. 9498. Although enthusiastic about its general objectives, representatives of both the unions and the shipping industry uniformly voiced dissatisfaction with the bill's jurisdictional provision. At the Committee hearings, a union spokesman pointed out that as originally drawn, the effect of the bill would necessarily be harmful to repairmen and longshoremen who continually pass back and forth between state and federal jurisdiction, each exclusive of the other. Hearings on S. 3170, Senate Judiciary Committee, 69th Cong., 1st Sess., March 16 and April 2, 1926, pp. 29-31. In the same vein, spokesmen for the shipping industry complained that the bill was not sufficiently inclusive and urged that the final bill "include all maritime employment under the admiralty jurisdiction." Senate Hearings, pp. 95-101. A representative of the Labor Department also appeared and testified that Congress had sufficient power to enact a compensation statute that would extend to all injuries to maritime workers occurring "on the dock, on the bridge and in the ship," and on behalf of the department argued for an amendment to the bill that would provide "coverage of the contract and not coverage of the men in one spot, performing one part of the contract." Senate Hearings, pp. 40-41.

The lone dissident voice was that of the International Association of Industrial Accident Boards and Commissions, author of the pending bill and the Acts previously declared unconstitutional. It sought to maintain the limited scope of the bill, leaving as much as was constitutionally permissible to the states.

At the conclusion of the hearings, the bill was revised and submitted to Congress in its present form. While no further explanation of the various revisions is to be found in either the committee reports or congressional debates, it is certainly reasonable to infer that the modifications represent an acquiescence in the broader coverage sought by almost all witnesses and, consequently, a rejection of the narrow jurisdictional position espoused by the IAIABC.

Beyond question, Congress could constitutionally ground jurisdiction on the function or status of the employees, as the Labor Department urged, and thus extend coverage to all longshoremen injured during the loading, unloading, repairing or refitting of vessels regardless of the situs of the injury. See The Admiralty Extension Act, 46 U.S.C.A. § 740 (1948);<sup>5</sup> *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206 (1963); *American Stevedoring v. Porello*, 330 U.S. 446 (1947); *Sanderlin v. Old Dominion Stevedoring Corp.*, ..... F. 2d ..... (4 Cir. 1967); *Spann v. Lauritzen*, 344 F. 2d 204 (3 Cir. 1965); *United States v. Matson Nav. Co.*, 201 F. 2d 610 (9 Cir. 1953).<sup>6</sup> The question, therefore, is whether Congress fully exercised this power, as the injured longshoremen contend, or whether it incorporated in the revised bill the phrase "upon the navigable waters" specifically to freeze coverage to injuries occurring within the admiralty tort jurisdiction as it as thought to exist in 1927, as the stevedoring and insurance companies insist. While the definitive answer is not forthcoming from either the Act itself or its history, we find substantial support for the conclusion that Congress designed the Act to be status

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<sup>5</sup> The act provides:

"The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."

<sup>6</sup> See also, *Thompson v. Calmar Steamship Corp.*, 331 F. 2d 657 (3 Cir. 1964); *Hagans v. Ellerman and Bucknall Steamship Co.*, 318 F. 2d 563 (3 Cir. 1963); *Puget Sound Bridge & Dry Dock Co. v. O'Leary*, 260 F. Supp. 260, 264 (W.D. Wash. 1966).

oriented, reaching all injuries sustained by longshoremen in the course of their employment.<sup>7</sup>

<sup>7</sup> The Senate revisions, concurred in by the House, certainly met many of the objections raised by the witnesses; how far they went toward meeting the Labor Department's suggestion that the bill be status oriented is admittedly less clear.

The passage from the Senate Report, No. 973, 69th Cong., 1st Sess. 16, most often relied upon to support the narrow jurisdictional view that Congress intended to limit coverage to injuries occurring within the maritime tort jurisdiction as it was then thought to exist, excluding pier-side injuries, reads as follows:

"The purpose of this bill is to provide for compensation, in the stead of liability, for a class of employees commonly known as 'longshoremen.' These men are mainly employed in loading, unloading, refitting, and repairing ships; but it should be remarked that injuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship so as to bring them within the maritime jurisdiction of the United States."

While it has been said that this passage suggests that the Senate Committee intended the Act to be situs oriented, it is no less reasonable to read the passage as extending the benefits of the Act to all who may be brought within the maritime jurisdiction. Moreover, other passages from the Reports of both Houses indicate that Congress was primarily concerned with the status of the potential claimants. For example, in the Senate Report, in the paragraph immediately following the oft-cited passage quoted above, it is stated:

"If longshoremen could avail themselves of the benefits of State compensation laws, there would be no occasion for this legislation; but, unfortunately, *they are excluded from these laws by reason of the character of their employment*; and they are not only excluded but the Supreme Court has more than once held that Federal legislation cannot, constitutionally, be enacted that will apply State laws to this *occupation*. (Emphasis added.) S. Rep. No. 973, 69th Cong., 1st Sess. 16"

To like effect is H.R. Rep. No. 1767, 69th Cong., 2d Sess. 20:

"The principle of workmen's compensation has become so firmly established that simple justice would seem to require that this class of maritime workers should be included in this legislation \* \* \*."

The bill as amended, therefore, will enable Congress to discharge its obligation to the *maritime workers placed under their jurisdiction by the Constitution of the United States* by providing for them a law whereby they may receive the benefits of workmen's compensation and thus afford them the same remedies that have been provided by legislation for those killed



Prolonged discussion of this issue is now unnecessary, however, since it has been authoritatively resolved by the Supreme Court in *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114 (1962). Quoting with approval the Fifth Circuit in *Debardelen Coal Corp. v. Henderson*, 142 F. 2d 481 (1944), the Court stated:

"The elaborate provisions of the Act, viewed in light of prior Congressional legislation as interpreted by the Supreme Court, leaves no room for doubt, as it appears to us, that Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject matter. \* \* \* It is sufficient to say that Congress intended the compensation act to have a coverage co-extensive with the limits of its authority." 370 U.S. at 130. (Emphasis added.)

Those opposed to extending coverage in the instant case argue that *Calbeck* has no bearing since the Supreme Court was not concerned with the meaning of "upon the navigable waters," but was merely interpreting the phrase

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or injured in the course of their employment in nearly every State in the union." (Emphasis added.)

Or, as Congressman LaGuardia summed up:

"This law simply gives the longshoreman the benefit of up-to-date legislation to cover injuries sustained in the course of their employment. That is all there is to it." 68th Cong. Rec. 5414.

We are aware that the Fifth Circuit recently reached the opposite conclusion in *Travelers Insurance Company v. Shea*, 382 F. 2d 344, 346 (1967), stating, "[t]he coverage of the Act is not keyed to function but has uniformly been situs-oriented," relying on its own opinion in *O'Keeffe v. Atlantic Stevedoring Co.*, 354 F. 2d 48, 50 (1965). A refutation of the asserted uniformity appears in the same circuit's decision in *Holland v. Harrison Bros.*, 306 F. 2d 369, 373 n.4 (1962), that while "[t]he literal language of the Longshoremen's Act seems to concern only the locality of the accident, \* \* \* the history of the Act indicates that its underlying purpose was to embrace the admiralty jurisdiction whatever that might be." We think that in the latter decision the Fifth Circuit expressed the correct view.

"if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law." In answer, we need only repeat Judge Palmieri's observation in *Michigan Mutual Liability Co. v. Arrien*, 233 F. Supp. 496, 501 (S.D. N.Y. 1965), *aff'd*, 344 F. 2d 640 (2 Cir. 1965), that "[w]hat is just as important as the actual holding in *Calbeck* is the general approach to the [Longshoremen's Compensation] Act taken by the Court. No longer is the Act viewed as merely filling in the interstices around the shore line of the state act, but rather as an affirmative exercise of admiralty jurisdiction."

This affirmative exercise of the admiralty power of Congress "to the fullest extent" of its jurisdiction, creating "a coverage co-extensive with the limits of its authority," can only mean that Congress effectively enacted a law to protect all who could constitutionally be brought within the ambit of its maritime authority. Again, in the words of Judge Palmieri, "it thus appears that 'upon navigable waters' is to be equated with 'admiralty jurisdiction.'"

This interpretation of the Act, giving the injured longshoreman the broadest protection, not only fully complies with the mandate of the Supreme Court in *Voris v. Eikel*, 346 U.S. 328, 333 (1953) that the Act be liberally construed, but also comports with the Court's observation in *Calbeck*, *supra* at 123, that the Act should be read to avoid the "uncertainty, expense, and delay of fighting out in litigation" the proper source of compensation, state or federal. As early as 1942, the Court sought to attain this objective by recognizing that the "undefined and undefinable" boundaries between state and maritime jurisdiction created a "twilight zone" of overlapping jurisdictions. *Davis v. Department of Labor and Industries*, 317 U.S. 249. Aptly described by Judge Qua as "designed to include within a wide circle of doubt all water front cases involving aspects pertaining both to land and the sea where a reasonable argument can be made either way," *Moore's Cases*, 323 Mass. 162, 167, 80 N.E. 2d 478, 481, *aff'd sub. nom.*, *Bethlehem Steel Co. v. Moore's*, 335 U.S. 874 (1948), this "twi-

light zone" merely represented a judicial articulation of the presumption of coverage incorporated in the Act.<sup>8</sup>

An alternative route, advocated by some courts, would also extend coverage under the Act. Concluding that Congress had exercised the more limited tort jurisdiction, Judge Palmieri in *Michigan Mutual, supra*, and Judge Winter in *Boston Metals v. O'Hearne*, 1946 A.M.C. 2351 (D. Md. 1963), *aff'd*, 329 F. 2d 504 (4 Cir. 1964), *cert. denied*, 379 U.S. 824 (1964), nevertheless found that accidents that might previously have fallen outside the scope of the Act are covered by virtue of the expansion of the admiralty tort jurisdiction. They reasoned, in light of *Calbeck* that the phrase "upon navigable waters" in this remedial legislation was not limited to the tort jurisdiction as it was thought to have existed in 1927, but must be construed to include the full range of the legislatively and judicially expanded concept of maritime jurisdiction.<sup>9</sup> Thus, with the passage of the Admiralty Extension Act, the protection afforded by the Compensation Act was given an expanded construction covering pier-side injuries. Other cases that have read *Calbeck* to enlarge coverage under

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<sup>8</sup> Section 920. Presumptions

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

- (a) That the claim comes within the provisions of this chapter.

<sup>9</sup> While both judgments were affirmed, by the Second and Fourth Circuits, respectively, in neither case did the Court of Appeals find it necessary to reach this precise issue. There is dictum in the Second Circuit's opinion that an injury on the wharf might not qualify under the Compensation Act. Judge Kaufman, however, specifically reserved the question, stating: "In view of the reasons we have articulated for our holding we find it is unnecessary to decide whether the award may also be sustained on the ground that the Admiralty Extension Act \* \* \* enlarged the coverage of the Longshoremen's Act." 344 F. 2d at 646 n.4. Indeed, the opinion went on to observe that *Calbeck* "has been interpreted, in every appellate decision where the question has arisen, as mandating that a federal compensation award must be upheld if there is a reasonable argument for coverage under the Longshoremen's Act." 344 F. 2d at 646.

the Act include *Interlake S.S. Co. v. Nielsen*, 338 F. 2d 879, 882-883 (6 Cir. 1965); *Spann v. Lauritzen*, *supra*;<sup>10</sup> *Puget Sound Bridge & Dry Dock Co. v. O'Leary*, *supra*.<sup>11</sup>

Moreover, *Calbeck* is not the only Supreme Court decision pointing inescapably to this conclusion. In *Reed v. Yaka*, 373 U.S. 410, 415 (1963), the Court reiterated its earlier mandate that "the Longshoremen's Act 'must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.'"<sup>12</sup> This direction was then amplified by the explanation that "[i]t would produce a harsh and incongruous result, one out of keeping with the dominant intent of Congress to help longshoremen, to distinguish between liability to longshoremen injured under precisely the same circumstances \* \* \*. [Those] subject to the same danger \* \* \* [are] entitled to like treatment under law."<sup>13</sup> It is precisely such a harsh

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<sup>10</sup> Although the issue was not before the court, we read the inclusion of a passage from *Reed v. Yaka*, 373 U.S. 410 (1963) to the effect that "the Longshoremen's and Harbor Workers' Act was not intended to take away from longshoremen the traditional remedies of the sea, so that recovery for unseaworthiness could be had notwithstanding the availability of compensation," as an indication that the Third Circuit would have upheld an award to the longshoreman, who, in that case was injured on a pier by the handle of a hopper also located on the pier during the unloading of a vessel.

<sup>11</sup> To the extent that the present opinion deviates from this court's earlier pronouncement in *American Export Lines, Inc. v. Revel*, 266 F. 2d 82 (1959), we are of the view that *Revel* has been overruled by *Calbeck*.

<sup>12</sup> *Voris v. Eikel*, 346 U.S. 328, 333 (1958).

<sup>13</sup> We are of the opinion that the passage quoted above from *Reed v. Yaka* clearly proscribes the conclusion reached by the Fifth Circuit in *Travelers Insurance Company v. Shea*, 382 F. 2d 344, 346 (1967) that "[s]ince there exists hybrid employment with labors terrestrial and maritime and since state coverage does not preclude federal coverage, [*Calbeck*], we do have the paradox of two workers doing the same type of work a few feet apart receiving injuries in the same way, yet treated as legal strangers. The paradox is not judicially soluable unless we extirpate the words 'upon \* \* \* navigable waters \* \* \* (including any dry dock)' from the statutory commandment \* \* \*."

It is noteworthy that the court in *Travelers v. Shea*, *supra*, fails to analyze or consider the impact of *Calbeck* or *Yaka* on the Longshoremen's Compensation Act.

and incongruous result that the stevedores and their insurers now urge upon us.

We examine a number of these incongruities. First, as noted above, the injured longshoremen were members of a gang all of whom did basically the same work for the same pay and were subjected to the same risks, passing freely from ship to pier in the course of their work. All would concede that a longshoreman crushed by a rotating draft while working in a ship's hold would be entitled to recover under the Act. It would be intolerably harsh and incongruous to deny the same benefits to a longshoreman injured while performing the same task on an adjoining pier.

Secondly, courts have held that "upon navigable waters" covers injuries sustained by persons flying over the water, *D'Aleman v. Pan American World Airways*, 259 F. 2d 493 (2 Cir. 1956); working under the water, *Smith v. Brown & Root Marine Operators, Inc.*, 243 F. Supp. 130 (W.D. La. 1965); repairing ships on dry docks or the land around dry docks, *Avondale Marine Ways, Inc. v. Henderson*, 346 U.S. 366 (1953); *Holland v. Harrison Bros. Drydock & Ship Repair Yard, Inc.*, 306 F. 2d 269 (5 Cir. 1962); and constructing dry docks, *Newport News Shipbuilding & Dry Dock Co. v. O'Hearne*, 192 F. 2d 968 (4 Cir. 1951). The phrase "upon navigable waters" has also been held to cover injuries to longshoremen caught by the ship's gear, lifted momentarily from the pier, and dropped either into the slip or onto the pier itself, *O'Keeffe v. Atlantic Stevedoring Company*, 354 F. 2d 48 (5 Cir. 1965); *L'Hote v. Crowell*, 54 F. 2d 212 (5 Cir. 1931); *Richards v. Monahan*, 17 F. Supp. 252 (D. Mass. 1936). In *Interlake v. Nielsen*, *supra*, the Sixth Circuit upheld a judgment obtained on behalf of a maritime employee who drowned when he drove his car off the end of a pier. And presumably, the Act would further extend to a longshoreman injured in the waters immediately beneath the pier regardless of how he got there; but not, the stevedores here contend, to injuries sustained by maritime workers performing traditional maritime tasks, injured on a pier above the water.

The harshness and incongruity that would necessarily result in light of precedents above cited if we were to deny

coverage to pier-side injuries like those with which we are here concerned is readily apparent from the disparate treatment of the four longshoremen in the instant case. Although all, at the time of their injuries, were performing similar jobs exposing them to similar risks, only Vann, who happened to fall into the water, and Klosek, who was momentarily lifted from the pier, would qualify under the Act. Such fine-spun distinctions are clearly condemned by *Yaka, supra*.

A third incongruity, that would be frozen into law if the contentions of the stevedores were to prevail, is apparent from broad liberal construction that has been applied to the term "dry dock," *Holland v. Harrison Bros., supra*,<sup>14</sup> compared with the very narrow interpretation they would attach to the phrase "upon navigable waters." We perceive no rational justification for this diverse treatment.

Finally, the parties have stipulated that small vessels are able to navigate beneath the piers on which the accidents in the instant cases took place. These waters are therefore navigable in fact.<sup>15</sup> Since the jurisdictional scope of the

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<sup>14</sup> Dry docks were held to include the land surrounding them. See *Newport News Shipbuilding & Dry Dock Co. v. O'Hearne, supra*.

<sup>15</sup> We recognize that this conclusion appears to be in conflict with that recently reached by the Second Circuit in *Michigan Mutual Liability Co. v. Arrien*, 344 F. 2d 640, 644 (1965). Speaking for that court, Judge Kaufman stated: "A wharf or pier is usually built on pilings over what *was* navigable water. When the structure is completed, the water over which it is built is *permanently* removed from navigation as if the structure had been in the first instance built on land." With all deference, we find no support for this conclusion. It conflicts with the Supreme Court's holding that "when once found to be navigable, a waterway remains so." *United States v. Appalachian Power Co.*, 311 U.S. 377, 408 (1940); *Economy Light Co. v. United States*, 256 U.S. 113 (1921).

The generally accepted test of navigability was laid down by the Court in *Daniel Ball*, 77 U.S. 557, 563 (1870) as follows: "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel

phrase "upon navigable waters" extends to injuries occurring "above" such waters, see *D'Aleman v. Pan American Airways*, *supra*, we are compelled to conclude that the injuries suffered by Vann, Johnson, Klosek and Avery were all sustained upon the navigable waters of the United States.

Regardless of the route traveled, we arrive at the conclusion that the injuries of all four longshoremen are embraced by the Act. In rejecting the arguments advanced by the stevedoring companies, we are mindful of the pertinent observations of Judge Soper, presaging the recent Supreme Court decisions, that "[t]he reference to 'maritime employment' and injury 'upon the navigable waters of the United States (including any dry dock),' should be broadly construed," and that the coverage of the Act "should not be frustrated by needless refinements. *Newport News Shipbuilding and Dry Dock Co. v. O'Hearne*, 192 F. 2d 968, 971 (4 Cir. 1951).

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on water." (Emphasis added.) More recently, the Supreme Court declared that "[t]he fact \* \* \* that artificial obstructions exist capable of being abated by due exercise of the public authority, does not prevent the stream from being regarded as navigable in law, if, supposing them to be abated, it be navigable in fact in its natural state." *Economy Light and Power Co. v. United States*, *supra* at 118. See *Montello*, 87 U.S. 430, 431 (1874) ("If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact \* \* \*"); *Ingram v. Associated Pipeline Contractors, Inc.*, 241 F. Supp. 4 (E.D. La. 1965); *Madole v. Johnson*, 1965 A.M.C. 2610.

In light of these cases, Judge Waterman, also of the Second Circuit, concluded that a body of water is "navigable water" if "(1) it presently is being used or is suitable for use, or (2) it has been used or was suitable for use in the past, or (3) it could be made suitable for use in the future by reasonable improvements." *Rochester Gas and Electric Corp. v. F.P.C.*, 344 F. 2d 594 (1965). Certainly the waters in the instant case were navigable prior to the construction of the piers, will again be open to unlimited navigation if the piers are ever removed, and most relevantly, are now used in navigation. We would say, therefore, that the waters flowing beneath the piers upon which these accidents occurred are navigable in fact. Cf. *Nicholson v. Calbeck*, 385 F. 2d 221 (5 Cir. 1967).



We are well aware that the conclusions reached in this opinion have not been uniformly adopted in other circuits. See *Houser v. O'Leary*, 383 F. 2d 730 (9 Cir. 1967); *Traveler Insurance Company v. Shea*, 382 F. 2d 344 (5 Cir. 1967); *Nicholson v. Calbeck*, 385 F. 2d 221 (5 Cir. 1967); but see, also in the Fifth Circuit, *Holland v. Harrison Bros. Dry Dock and Repair Yard, Inc.*, *supra*. However, for the reasons fully developed herein, we decline to follow them.

We therefore affirm the judgment of the District Court upholding the deputy commissioner's award in *Marine Stevedoring v. Oosting*, No. 10,060, and reverse the judgments in *Johnson, Klosek and Avery*, Nos. 10,298, 10,299 and 10,323 which affirmed the denial of recovery and remand these cases for the entry of judgments consistent with this opinion.

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HAYNSWORTH, Chief Judge, with whom BOREMAN, Circuit Judge, joins, dissenting:

I concur in the affirmance of *Marine Stevedoring Corporation v. Oosting*, in which the longshoreman met his death by drowning, but I respectfully dissent in the other cases, in which the longshoremen died or were injured on the dock. When construing a statute, as we are, it is not for us heedlessly to pursue our own notion of what the congressional judgment should have been or to deal cavalierly with restrictions specified by Congress. Nor do we serve the purpose of eliminating incongruity by transferring it elsewhere in multiplied form and creating a vast area of uncertainty which can only be resolved by extensive litigation.

I had thought there could be little doubt about the intention of the Congress when it enacted the Longshoremen's and Harbor Workers' Compensation Act in 1927. Until then, longshoremen were covered by the compensation act of the state in which they were working as long as they were on the dock, but they had no such protection when they were on the ship or a gangplank. Twice the



Congress attempted to extend state compensation statutes to longshoremen when aboard a ship on navigable waters or on a gangplank between such a ship and the dock,<sup>1</sup> a result which would, at least, have put all longshoremen in the same state on a parity, but the Supreme Court, having earlier held that a state compensation act could not reach such a person,<sup>2</sup> struck down each statute as an unlawful delegation of congressional legislative power.<sup>3</sup> It was this very limited purpose to secure the benefits of some compensation system to longshoremen while working aboard a ship or while passing between the ship and the dock that prompted the Congress to enact its own compensation act when its attempts to extend the state statutes had been frustrated.

This purpose was clearly expressed in § 3 of the Act,<sup>4</sup> in which compensation protection was extended to injuries "occurring upon the navigable waters of the United States (including any drydock)" the limit of admiralty tort jurisdiction as it was then understood,<sup>5</sup> "and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law." The use of the words "upon the navigable waters of the United States" was clearly referable to the prior history of the problem deriving from the Supreme Court's decision in *Southern Pacific Co. v. Jensen*, *supra* n.2, and the additional caveat that the injury be beyond the constitutional

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<sup>1</sup> Act of October 6, 1917, 40 Stat. 395; Act of June 10, 1922, 42 Stat. 634.

<sup>2</sup> *Southern Pacific Co. v. Jensen*, 244 U.S. 205; *Clyde S.S. Co. v. Walker*, 244 U.S. 255.

<sup>3</sup> *Washington v. Dawson & Co.*, 264 U.S. 219; *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149.

<sup>4</sup> 33 U.S.C.A. § 903.

<sup>5</sup> *Crowell v. Benson*, 285 U.S. 22, 55; *Nogueira v. N.Y., N.H. & H. R.R. Co.*, 281 U.S. 128, 133, 138; *Washington v. Dawson*, 264 U.S. 219, 227, 235; *State Industrial Commission v. Nordenholt Corp.*, 259 U.S. 263, 273; *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52, 59-60; *Cleveland Terminal & Valley R.R. Co. v. Cleveland S.S. Co.*, 208 U.S. 316.

power of the states to compensate would seem to foreclose any doubt about the congressional intention in 1927.<sup>6</sup>

If there is any doubt about the congressional intention in the language of the statute, any notion that dockside injuries were intended to be covered is foreclosed by the legislative history. This was the third attempt to fill the void the Supreme Court's decisions had delineated. Congress sought to do no more. That purpose could hardly have been made more explicit than by the language in the Senate Report No. 973, 69th Cong., 1st Sess., 16, in which it was stated, "injuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship so as to bring them within the maritime jurisdiction of the United States."

It is true, of course, that a remedial statute such as the Longshoremen's and Harbor Workers' Compensation Act should be liberally construed to achieve its purpose, but not to pervert it. This one has been appropriately construed. The liberality with which it has been construed is exemplified by such cases as those holding that a marine railroad is a drydock within the drydock inclusion,<sup>7</sup> that injuries sustained upon or after contact with the water are within the coverage of the statute even though the long-

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<sup>6</sup> I recognize, of course, that the qualification that the injury be beyond the constitutional reach of state compensation acts may have been inserted for the purpose of demonstrating the congressional intention of remaining within the assumed limits of congressional power, *De Bardeleben Coal Corp. v. Henderson*, 5 Cir., 142 F. 2d 481, and that it was disregarded in that *tour de force*, which provided a highly practical, but "theoretic[ally] illogic[al]" solution to the problem of the "twilight zone" in which both the federal and the state statutes arguably may be said to apply. *Davis v. Department of Labor and Industries*, 317 U.S. 249, 259. Since our task is to define congressional intention, however, the words have an obvious and cogent relevance.

<sup>7</sup> *Avondale Marine Ways, Inc. v. Henderson*, 346 U.S. 366; *Holland v. Harrison Bros. Drydock & Ship Repair Yard, Inc.*, 5 Cir., 306 F. 2d 369; *Western Boat Bldg. Co. v. O'Leary*, 9 Cir., 198 F. 2d 409; *Maryland Cas. Co. v. Lawson*, 5 Cir., 101 F. 2d 732; *Continental Cas. Co. v. Lawson*, 5 Cir., 64 F. 2d 802. *But see O'Leary v. Puget Sound Bridge & Drydock Co.*, 9 Cir., 349 F. 2d 571.

shoreman was on the dock before falling or being propelled into the water,<sup>8</sup> by those cases holding the federal act applicable to workers aboard the floating hull of a vessel under construction,<sup>9</sup> or aboard the grounded hull of a decommissioned vessel being dismantled,<sup>10</sup> and to workers engaged in the construction or repair of drydocks,<sup>11</sup> and by those other cases which have attempted to bridge the fine line drawing the boundary between the reach of the federal and the state statutes.<sup>12</sup> It is significant, however, that in all of these cases outside of the drydock inclusion, the employee's injuries were suffered on the seaward side of the wharf's edge or resulted from an event occurring when the employee was aboard a ship, whether or not commissioned, or while in the act of passing between the ship and the dock. Strictly dockside injuries suffered on the dock as a result of forces exerted there have not been held to be covered. There has thus been a liberal interpretation of the congressional intention as expressed in the Senate Report, but the cases are consistent with that expression of intention.

<sup>8</sup> *O'Keeffe v. Atlantic Stevedoring Co.*, 5 Cir., 354 F. 2d 48; *Interlake S.S. Co. v. Nielsen*, 6 Cir., 338 F. 2d 879; *Puget Sound Bridge & Dry Dock Co. v. O'Leary*, 260 F. Supp. 260 (W.D. Wash. 1966); *Beasley v. O'Hearne*, 250 F. Supp. 49 (S.D. W.Va. 1966); *Gulf Oil Corp. v. O'Keeffe*, 242 F. Supp. 881 (E.D. S.C. 1965); *Thomsen v. Bassett*, 36 F. Supp. 956 (W.D. Mich. 1940). These are the cases that justify the affirmance of the award in *Marine Stevedoring Corp. v. Oosting*.

<sup>9</sup> *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114.

<sup>10</sup> *Boston Metals Co. v. O'Hearne*, 4 Cir., 329 F. 2d 504.

<sup>11</sup> *Newport News Shipbuilding & Dry Dock Co. v. O'Hearne*, 4 Cir., 192 F. 2d 968; *Travelers Ins. Co. v. McManigal*, 4 Cir., 139 F. 2d 949; *Travelers Ins. Co. v. Branham*, 4 Cir., 136 F. 2d 873.

<sup>12</sup> *Davis v. Department of Labor and Industries*, 317 U.S. 249; *Parker v. Motor Boat Sales*, 314 U.S. 244; *Michigan Mut. Liab. Co. v. Arrien*, 2 Cir., 344 F. 2d 640; *Taylor v. Baltimore & Ohio R.R. Co.*, 2 Cir., 344 F. 2d 281; *De Bardeleben Coal Corp. v. Henderson*, 5 Cir., 142 F. 2d 481; *L'Hote v. Crowell*, 5 Cir., 54 F. 2d 212; *Dixon v. Oosting*, 238 F. Supp. 25 (E.D. Va. 1965); *Machillo v. New York Cent. R.R. Co.*, 200 F. Supp. 805 (S.D. N.Y. 1962); *Caldaro v. Baltimore & Ohio R.R. Co.*, 166 F. Supp. 833 (E.D. N.Y. 1958); *West v. Erie R.R. Co.*, 163 F. Supp. 879 (S.D. N.Y. 1958); *Ford v. Parker*, 52 F. Supp. 98 (D. Md. 1943); *Richards v. Monahan*, 17 F. Supp. 252 (D. Mass. 1936).

To a limited extent some of the cases read out of the statute the limitation that the injury be beyond the power of the state to compensate, but the excision of that proviso was very restricted and partial, and done solely for the purpose of avoiding uncertainties and the loss of rights through an erroneous choice of remedy. Thus the federal statute and the state statute are both allowed to apply in the narrow area of the dock's edge where either statute arguably may be said to apply,<sup>13</sup> but nothing the Supreme Court said in *Calbeck* or elsewhere suggests that, contrary to the plainly expressed intention of the Congress, the reach of the federal statute may be extended to injuries which are clearly on the dockside of the line. The *Calbeck* opinion, itself, limits its applicability to injuries on navigable waters within the area delineated by *Jensen*, *Knickerbocker* and *Dawson*, and by those cases made questionable.<sup>14</sup>

In this scheme of things, of course, there is some incongruity when a member of a stevedoring crew injured on the dock is covered by the state statute while a member of the same crew injured on the ship is covered by the federal, and, if during the day, the same fellow works part of the time on the ship and part of the time on the dock, he passes from one jurisdiction to the other, but he is never without the protection of one statute or the other. The scheme has, at least, the virtue of as large an amount of certainty as could be provided in any division of authority. The edge of the dock is as clear a line as could be drawn. Except in the very rare case, there will be no doubt as to the remedy to be pursued, and doubtful cases need occasion little litigation. If the line is moved shoreward of the dock's edge, short of inclusion of every longshoreman wherever he may be and however he may be injured, it is bound to be vague and fuzzy and a fruitful source of contention and litigation, a circumstance quite inconsistent with the highly desirable

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<sup>13</sup> *Moore's Cases*, 323 Mass. 162, 80 N.E. 2d 478 (1948), *Aff'd sub. nom.* *Bethlehem Steel Co. v. Moore's*, 335 U.S. 874. See also *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114; *Baskin v. Industrial Accident Commission*, 338 U.S. 854; *Davis v. Department of Labor and Industries*, 317 U.S. 249.

<sup>14</sup> 370 U.S. 114, 126-127.

certainty which should accompany any system of workmen's compensation.

We, as judges, may think that it would be nice and equitable if all longshoremen were provided compensation protection by the same act, so that each would receive the same benefits from the same administrative agency wherever and however he was injured. That is one of the three alternative theories the majority employs to reach its conclusion, but the "status theory," as opposed to the "situs theory," has been firmly rejected by every court that has ever considered it<sup>15</sup> until now the majority embraces it. There is some support for the theory that coverage of the Compensation Act expanded with the expansion of admiralty's tort jurisdiction,<sup>16</sup> but not for the majority's conclusion that the Compensation Act was initially intended, or later grew, to be coextensive with the admiralty's contract jurisdiction. The phrasing of the statute, as well as its history, shows a rejection, not an adoption, of the suggestion of the Department of Labor that the contract be covered rather than places. Had it been intended to adopt the contract theory, the statutory language "on the navigable waters" could hardly have been more inappropriate for effectuation of that intention. The words, introduced as a substitute for the words, "within the admiralty jurisdiction," require a "situs" approach, as all courts have held or assumed, not a "status" approach.

Next it is said by the majority that the compensation statute was amended by the Admiralty Extension Act of 1948,<sup>17</sup> which extended the admiralty tort jurisdiction to injuries sustained on land, provided they were caused by a vessel on navigable waters. The Ninth Circuit has re-

<sup>15</sup> *Travelers Ins. Co. v. Shea*, 5 Cir., 382 F. 2d 344; *O'Keeffe v. Atlantic Stevedoring Co.*, 5 Cir., 354 F. 2d 48. *See also* *Houser v. O'Leary*, 9 Cir., 383 F. 2d 730. *But see* *Holland v. Harrison Bros. Drydock & Ship Repair Yard, Inc.*, 5 Cir., 306 F. 2d 369, 373 n.4.

<sup>16</sup> *See* *Michigan Mut. Liab. Co. v. Arrien*, 233 F. Supp. 496 (S.D. N.Y. 1964); *Boston Metals v. O'Hearne*, 1964 A.M.C. 2351 (D. Md. 1963). The issue was not reached on appeal in either case.

<sup>17</sup> 46 U.S.C.A. § 740.

jected this theory in a recent case<sup>18</sup> in which the Supreme Court denied certiorari just three months ago.<sup>19</sup> As Judge Watkins pointed out in one of the opinions from which these appeals come,<sup>20</sup> no such intention is evident in the Admiralty Extension Act, its legislative history or the subsequent legislative history of the Compensation Act. The Admiralty Extension Act contains no reference to the Compensation Act, and five days after enactment of the Admiralty Extension Act the Compensation Act was amended to increase the benefits payable,<sup>21</sup> but neither in that amendment nor in any of its legislative history is there any reference to the Admiralty Extension Act. Bearing in mind the initial deliberate choice of the Congress to substitute the words "upon the navigable waters" as the definition of the covered injuries for the words "within the admiralty jurisdiction,"<sup>22</sup> as was first proposed in 1927 when the Compensation Act was enacted, a holding that the Admiralty Extension Act enlarged the scope of the Compensation Act appears a judicial ukase without legislative support.

Finally, the majority attempts to support its conclusion on the theory that the waters beneath the piers in these cases were navigable, because it either appears or it is assumed that they could be traversed by a skiff or a canoe, which leads them to the conclusion that an injury on the dock above such waters is "upon the navigable waters of the United States." This theory, of course, flies in the face of the settled doctrine that the pier is an extension of the land.<sup>23</sup> It has been specifically rejected by the Fifth Circuit

<sup>18</sup> *Houser v. O'Leary*, 9 Cir., 383 F. 2d 730.

<sup>19</sup> *Houser v. O'Leary*, 390 U.S. 954.

<sup>20</sup> *Johnson v. Traynor*, 243 F. Supp. 184, 190-192 (D. Md. 1965). See also *Travelers Ins. Co. v. Shea*, 5 Cir., 382 F. 2d 344, 349-350, cert. denied 389 U.S. 1050, approvingly quoting Judge Watkins' reasoning.

<sup>21</sup> 62 Stat. 602.

<sup>22</sup> Had those words been adopted by the Congress, they would furnish some basis for the majority's contract theory; their rejection by the Congress refutes the theory.

<sup>23</sup> *Swanson v. Marra Bros., Inc.*, 328 U.S. 1; *Minnie v. Port Huron Terminal Co.*, 295 U.S. 647; *T. Smith & Son, Inc. v. Taylor*, 276 U.S. 179; *State Industrial Commission v. Nordenholt Corp.*,

in two very recent cases,<sup>24</sup> in which the Supreme Court denied certiorari only five months ago.<sup>25</sup> Again, it seems to me wholly inconsistent with the congressional mandate which governs us and the clearly expressed congressional intention.

If the majority's conclusion may be thought to be justified by its statement of the desirability of elimination of incongruity, consider the barrel of incongruities its opinion will create.

A longshoreman working on a quay or wharf at the harbor's edge and beneath which no waters flow but to which a vessel being loaded is tied, would not be covered by the federal statute under the third theory adopted by the majority, though one working nearby upon that portion of a pier which is seaward of high water would be covered. On the same pier a longshoreman would be covered if he was on the seaward side of high water when hurt and not covered if he were not. Under the status theory a longshoreman would be covered wherever he was injured, even several miles from the water on an errand to pick up supplies and however he was hurt, but on the Admiralty Extension Act amendment theory he would not be covered even though working on a pier beneath which waters flow, unless his injury was caused by the vessel or by some equipment appurtenant to the vessel. Is he covered under the majority's conclusion if he is working on a pier beneath

259 U.S. 263; *Cleveland Terminal & Valley R.R. Co. v. Cleveland S.S. Co.*, 208 U.S. 316; *The Plymouth*, 70 U.S. (3 Wall.) 20; *Houser v. O'Leary*, 9 Cir., 383 F. 2d 730, *cert. denied* 390 U.S. 954; *O'Keeffe v. Atlantic Stevedoring Co.*, 5 Cir., 354 F. 2d 48; *Michigan Mut. Liab. Co. v. Arrien*, 2 Cir., 344 F. 2d 640; *Hastings v. Mann*, 4 Cir., 340 F. 2d 910; *Wiper v. Great Lakes Engineering Works*, 6 Cir., 340 F. 2d 727; *American Export Lines, Inc. v. Revel*, 4 Cir., 266 F. 2d 82; *O'Loughlin v. Parker*, 4 Cir., 163 F. 2d 1011; *Johnson v. Marshall*, 9 Cir., 128 F. 2d 13; *Benedict on Admiralty* § 29 (6 ed.); *Gilmore & Black, The Law of Admiralty* § 6-46 (1957 ed.); *Robinson on Admiralty* § 11 (1939 ed.).

<sup>24</sup> *Nicholson v. Calbeck*, 5 Cir., 385 F. 2d 221; *Travelers Ins. Co. v. Shea*, 5 Cir., 382 F. 2d 344.

<sup>25</sup> *Nicholson v. Calbeck*, 389 U.S. 1051; *McCullough v. Travelers Ins. Co.*, 389 U.S. 1050.



which waters flow and not covered if he is working on a quay? Is he covered if his injuries are caused by a shore-based crane engaged in loading the ship, but not covered if he is struck by a switch engine moving empty freight cars? Is he covered when struck down by an automobile on a street while on the way to get supplies from a stevedore's warehouse? Since the contract theory would bring all long-shoremen within the coverage of the Act, reference to the other theories suggests that coverage would exist only if the circumstances satisfied all three of them. Would any two suffice?

The majority answers none of these questions. I would not suppose it appropriate that they now undertake to do so, but they illustrate the multitude of incongruities they would substitute for those they seek to eliminate and the extensive uncertainty they introduce in an area in which costly and prolonged litigation ought not to be necessary to ascertain the appropriate remedy.

Congress, if it wishes, may amend the statute to extend its coverage in a rational way to some point of reasonable certainty. The Court in deciding specific cases can achieve no such comprehensive result, and its attempt to do so is a grave distortion of the statute which seems to me plainly to limit us and to provide for compensation only for injuries suffered arguably on the seaward side of the edge of the dock.

Through the Supreme Court's decision in *Davis v. Department of Labor and Industries*, *supra* n. 12, "astonished, bewildered and occasionally outraged the legal profession,"<sup>26</sup> it served the very practical purpose of eliminating confusion within the defined twilight zone, confusion which the Supreme Court rightly regarded as unfair to employers and employees alike. Now we take the other road to spread confusion where none existed before and to sow vast thickets of controversy and litigation which no system of workmen's compensation can afford.

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<sup>26</sup> Gilmore & Black, *The Law of Admiralty* 349 (1957 ed.).



APPENDIX C

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JUDGMENT

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(Filed June 20, 1968)

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United States Court of Appeals for the Fourth Circuit

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No. 10,298

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William H. Johnson,

Appellant,

v.

John P. Traynor, Deputy Commissioner, U. S. Department of Labor, and Nacirema Operating Co., Inc.,  
a body corporate,

Appellees.

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Appeal from the United States District Court for the District of Maryland.

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the United States District Court for the District of Maryland, at Baltimore, for further proceedings consistent with the opinion of the Court filed herein.

SIMON E. SOBELOFF,

United States Circuit Judge.

JUDGMENT

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(Filed June 20, 1968)

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United States Court of Appeals for the Fourth Circuit

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No. 10,299

---

*Julia T. Klosek, widow of Joseph J. Klosek,  
deceased employee,*

*Appellant,*

*v.*

*John P. Traynor, Deputy Commissioner, U. S. Department of Labor, and Nacirema Operating Co., Inc.,  
a body corporate,*

*Appellees.*

---

Appeal from the United States District Court for the District of Maryland.

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the United States District Court for the District of Maryland, at Baltimore, for further proceedings consistent with the opinion of the Court filed herein.

SIMON E. SOBELOFF,

United States Circuit Judge.

JUDGMENT

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(Filed June 20, 1968)

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United States Court of Appeals for the Fourth Circuit

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No. 10,323

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Albert Avery,

Appellant,

v.

*Jerry C. Oosting, Deputy Commissioner, United States  
Employees' Compensation Commission, Fifth Compensa-  
tion District, and Liberty Mutual Insurance Company,*

*Appellees.*

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Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of Virginia, at Norfolk, for further proceedings consistent with the opinion of the Court filed herein.

SIMON E. SOBELOFF,

United States Circuit Judge.

# In the Supreme Court of the United States

OCTOBER TERM, 1968

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No.

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JOHN P. TRAYNOR AND JERRY C. OOSTING, DEPUTY  
COMMISSIONERS, PETITIONERS

v.

WILLIAM H. JOHNSON, JULIA T. KLOSEK AND  
ALBERT AVERY

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The Solicitor General, on behalf of John P. Traynor and Jerry C. Oosting, Deputy Commissioners of the Department of Labor, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in these consolidated cases.<sup>1</sup>

## OPINION BELOW

The opinion of the court of appeals, sitting *en banc*, is set forth at pages 40a-64a of the petition in No. 528, this Term. It is not yet reported. The opinions of the

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<sup>1</sup>In No. 528, this Term, Nacirema Operating Company and Liberty Mutual Insurance Company, two of the appellees below, have also filed a petition for a writ of certiorari to review this judgment.

tort jurisdiction to cover pier-side injuries. In addition, the court held that the statutory standard that the injury occur upon the navigable waters of the United States was satisfied because small vessels are in fact able to navigate beneath the piers on which the accidents took place. The dissenting judges contended that the settled interpretation of the compensation statute is that its coverage depends upon the "situs" of the injury, and that pier-side injuries are excluded from coverage.

#### REASONS FOR GRANTING THE WRIT

As the court below recognized (Pet. App., No. 528, this Term, p. 56a), its decision conflicts with decisions of the Fifth and Ninth Circuits. See *Nicholson v. Calbeck*, 385 F. 2d 221 (C.A. 5), certiorari denied, 389 U.S. 1051; *Travelers Ins. Co. v. Shea*, 382 F.2d 344 (C.A. 5), certiorari denied *sub nom. McCullough v. Travelers Ins. Co.*, 389 U.S. 1050; *Houser v. O'Leary*, 383 F. 2d 730 (C.A. 9), certiorari denied, 390 U.S. 954.<sup>4</sup>

Because of this conflict, longshoremen sustaining identical pier-side injuries in different States, even though they are in the same compensation district, will have different remedies depending upon whether the State happens to be in the Fourth, Fifth, or Ninth Circuit. For example, while claims for injuries occurring in South Carolina and Georgia are handled by the same deputy commissioner, benefits will now be awarded for a pier-side injury occurring in South

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<sup>4</sup> On October 14, 1968, this Court denied a consolidated motion for leave to file a petition for rehearing in these three cases.

Carolina but denied when the accident occurs in Georgia (see 20 C.F.R. 31.2).

Furthermore, those injured in States located in other circuits must risk "the uncertainty, expense, and delay of fighting out in litigation" whether the circuit will permit or deny compensation under the Act. See *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 121-122. Since pier-side injuries of longshoremen are not uncommon, the present state of the law thus will cause confusion in a large number of cases. The question is plainly one of general importance which only this Court can resolve.

#### CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ERWIN N. GRISWOLD,  
*Solicitor General.*

EDWIN L. WEISL, Jr.  
*Assistant Attorney General.*

JOHN C. ELDRIDGE,  
STEPHEN R. FELSON,  
*Attorneys.*

OCTOBER 1968.

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# Supreme Court of the United States

October Term, 1942

No. ~~1000~~ 9

**MACIREMA OPERATING CO., INC. and  
LIBERTY MUTUAL INSURANCE COMPANY,**

*Petitioners,*

**WILLIAM H. JOHNSON, JULIA T. KLOSEK  
and ALBERT AVERY,**

*Respondents.*

**On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Fourth Circuit.**

**BRIEF OF NATIONAL ASSOCIATION OF STEVE-  
DORES, PACIFIC AMERICAN STEAMSHIP  
ASSOCIATION, LAKE CARRIERS  
ASSOCIATION, ET AL.,  
AMICI CURIAE.**

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Carriers Association, et al.,  
Amici Curiae.*

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## STATEMENT OF INTEREST.

This brief, amici curiae, is filed in support of the petition for certiorari in the above-entitled cases.<sup>1</sup>

The parties hereto are as follows: National Association of Stevedores, Pacific American Steamship Association, Lake Carriers Association, Master Contracting Stevedore Association of the Pacific Coast, Inc., West Gulf Maritime Association, Philadelphia Marine Trade Association, and the North Atlantic Ports Association.<sup>2</sup>

The specific question presented in this appeal is whether injuries sustained by longshoremen on a pier are covered under the Longshoremen and Harbor Workers' Compensation Act (33 U. S. C. A. § 903(a)) (hereinafter

1. The consent of all the parties to the above cases to the filing of this brief, amici curiae, was mailed to the Clerk of this Court on September 13, 1968.

2. The National Association of Stevedores represents the vast majority of the major contract stevedoring companies located in every port throughout the United States.

The Pacific American Steamship Association represents American shipowners domiciled on the Pacific Coast.

The Lake Carriers Association is comprised of some twenty-two separate companies owning and/or operating a total of two hundred and six (206) United States flag vessels in the Great Lakes.

The Master Contracting Stevedore Association of the Pacific Coast, Inc. represents all of the stevedoring companies in California, Oregon, Washington and Alaska who are the direct employers of all longshoremen on the Pacific Coast.

The West Gulf Maritime Association represents steamship owners, operators, agents and stevedoring contractors in all the Texas ports and the Port of Lake Charles, La.

The New Orleans Steamship Association represents steamship owners, operators, agents and stevedoring contractors in the Port of New Orleans.

The Philadelphia Marine Trade Association likewise represents steamship owners, operators, agents and stevedoring contractors in the Port of Philadelphia.

The North Atlantic Ports Association is a regional association of approximately one hundred members consisting of steamship lines, terminal operators, port authorities and stevedoring contractors from Maine to Virginia.

"Longshoremen's Act") or, as uniformly held until the decision below, are such injuries covered by the applicable State compensation acts.

All of the above named parties have a profound and vital interest in the resolution of the question involved. These parties act as the spokesman for practically all of the employers and/or employer associations in the United States who are involved in the employment of longshoremen. For this reason they seek to acquaint the Court with the views of a substantial segment of the maritime industry as a whole as to why the petition for a writ of certiorari should be granted.

### **ISSUES NOT COVERED IN PETITION.**

The main portion of the petition filed in the instant cases is devoted to demonstrating that the decision below of the Court of Appeals for the Fourth Circuit is erroneous and in conflict with the recent decisions of the Court of Appeals for the Fifth Circuit,<sup>3</sup> and with the recent decision of the Court of Appeals for the Ninth Circuit;<sup>4</sup> and that the question presented is of exceptional importance to the maritime industry of this country. While agreeing fully with the reasons covered in the petition, we respectfully submit that there are at least three other important reasons why the petition should be granted:

1. The decision below nullifies the will of Congress as set forth in the Longshoremen's Act;

2. The decision below is contrary to decisions of this Court in at least two cases;

3. The decision below is contrary to a recent decision of the Court of Appeals for the Second Circuit.

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3. *Travelers Insurance Company v. Shea*, 382 F. 2d 344, cert. den. 389 U. S. 1050, and *Nicholson v. Calbeck*, 385 F. 2d 221, cert. den. 389 U. S. 1051.

4. *Houser v. O'Leary*, 383 F. 2d 730, cert. den. 390 U. S. 954.

We believe it will be helpful to this Court to have these additional reasons developed. This brief is therefore addressed to that task.

### REASONS FOR GRANTING THE WRIT.

The Longshoremen's Act has been the subject of extensive litigation. However, there can be no serious doubt from the legislative history of the Act and the myriad cases subsequent to the Act that it was not enacted to provide coverage for longshoremen injured while working on a pier.

The genesis of the Act was the Jensen case (*Southern P. Co. v. Jensen*, 244 U. S. 205, 61 L. ed. 1086, 37 S. Ct. 524), which decided that State compensation acts could not cover a longshoreman's injury which occurred on a gangplank between a pier and a vessel. After Jensen, Congress tried unsuccessfully on two occasions to grant to the States jurisdiction over all longshore injuries. These statutes were set aside by this Court.<sup>5</sup> As a result, the Longshoremen's Act thereafter was passed solely and exclusively to cover injuries which occurred between a pier and vessel, on a vessel and at a dry dock.<sup>6</sup>

This Court, in *Calbeck v. Travelers Ins. Co.*, 370 U. S. 114, 8 L. ed. 2d 368, 82 S. Ct. 1196, after an exhaustive review of the legislative history of the Longshoremen's Act made it crystal clear that the purpose of that Act was to

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5. *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 64 L. ed. 834, 40 S. Ct. 438; *Washington v. W. C. Dawson & Co.*, 264 U. S. 219, 68 L. ed. 646, 44 S. Ct. 302.

6. For legislative history see: Hearings before the Senate Judiciary Committee on S 3170, 69th Cong., 1st Sess.; Hearings before the House Judiciary Committee on S 3170, 69th Cong., 1st Sess.; S Rep. No. 973, 69th Cong., 1st Sess.; HR Rep. No. 1767, 69th Cong., 2d Sess. See also HR Rep. No. 1190, 69th Cong., 1st Sess. (accompanying HR 12063); Hearings before the House Judiciary Committee on HR 9498, 69th Cong., 1st Sess.

provide Federal compensation "in every case, that is, where Jensen might have seemed to preclude State compensation." 370 U. S. at 373. The *Jensen* case never raised any question as to the validity of State jurisdiction covering longshoremen's injuries on a pier.<sup>7</sup>

The interpretation placed on the Longshoremen's Act by the Bureau of Employers Compensation is also highly significant. The District Court in the *Johnson* and *Klosek* cases (*Johnson v. Traynor*, 243 F. Supp. 184 (1965)) succinctly pointed out that:

"The Bureau of Employees Compensation of the United States Department of Labor which has been charged with administering the Longshoremen's Act since it was passed, has consistently construed it as not applying to injuries occurring upon a wharf. Opin-

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7. This Court on four separate occasions in *Calbeck*, *supra*, pointed out that the Longshoremen's Act was only intended to cover injuries which occurred "on navigable waters." The Court said:

"Our conclusion is that Congress invoked its constitutional power so as to provide compensation for all injuries sustained by employees on navigable waters . . . (U. S. at 117, L. ed. 371).

There emerges from the complete legislative history a congressional desire for a statute which would provide federal compensation for all injuries to employees on navigable waters; . . . (U. S. at 120, L. ed. 373).

In sum, it appears that the Longshoremen's Act was designed to ensure that a compensation remedy existed for all injuries sustained by employees on navigable waters, . . . (U. S. at 124, L. ed. 375).

We conclude that Congress used the phrase "if recovery . . . may not validly be provided by State law" in a sense consistent with the delineation of coverage as reaching injuries occurring on navigable waters. By that language Congress reiterated that the Act reached all those cases of injury to employees on navigable waters as to which Jensen, Knickerbocker and Dawson had rendered questionable the availability of a state compensation remedy." (U. S. at 126, L. ed. 376).

ion No. 16, 1927 A.M.C. 1855. The court is advised that the Bureau still construes the Act as not covering injuries which occur wholly upon a wharf." (id. at 191)

In 1946, in *Swanson v. Marra Brothers*, 328 U. S. 1, 66 S. Ct. 869, 90 L. ed. 1045, this Court unequivocally reaffirmed the principle that injuries occurring on a pier were not covered under the Longshoremen's Act. There, this Court said:

"But since this Act is restricted to compensation for injury occurring on navigable waters, it excludes from its own terms and from the Jones Act any remedies against the employer for injuries inflicted on shore." (U. S. at 7, L. ed. 1049.)

The Court of Appeals for the Second Circuit in *Michigan Mutual Liability Co. v. Arrien*, 344 F. 2d 640 (1965), after referring to *Swanson v. Marra Brothers*, *supra*, and the legislative history of this Act, stated that "injuries upon wharves or other extensions of land permanently covering navigable waters were not to be covered." The Court said:

"A wharf or pier is usually built on pilings over what *was* navigable water. When the structure is completed, the water over which it is built is *permanently* removed from navigation as if the structure had been in the first instance built on land." (Emphasis in decision) (id. at 644)

The Court of Appeals for the Fifth Circuit in *Travelers Ins. Co. v. Shea*, 382 F. 2d 444 (1967), pointed out that: "The coverage of the Act is not keyed to function but has

uniformly been situs-oriented.”<sup>8</sup> The Court reiterated that structures such as wharves, piers and docks affixed permanently to shore traditionally have been held to be extensions of land and any remedies for injuries occurring on such structures have been held to be restricted to those afforded by local law.<sup>9</sup> The Court said:

“If injuries occurring ‘over’ as well as ‘upon’ navigable waters were Congressionally intended to be covered by the Longshoremen’s Act, the statute could and would have so read. It does not.” (id. at 347)

As recently as September, 1967, the Ninth Circuit in *Houser v. O’Leary*, *supra*, held that a pier injury was not covered by the Longshoremen’s Act. This Court denied certiorari in 390 U. S. 954 on March 4, 1968.

Again, in *Nicholson v. Calbeck*, *supra*, decided October, 1967, the Fifth Circuit also decided that a pier injury did not come within the provisions of the Longshoremen’s Act. This Court denied certiorari (389 U. S. 1051) in that case on January 15, 1968.

8. The Court below committed reversible error in concluding that “Congress designed the Act to be status oriented”, thereby misconstruing the true intent and purpose of the Act which was predicated upon “situs”—the place where the injury occurred and not upon “status”—the function being performed. This Court in *Calbeck*, *supra*, made it unmistakably clear that the Longshoremen’s Act was based on situs and not status. See footnote 7, *supra*.

9. Indeed, until the decision below this principle has been uniformly upheld. See: *State Industrial Commission of State of New York v. Nordenholt Corp.*, 1922, 259 U. S. 263, 42 S. Ct. 473, 66 L. ed. 933; *American Export Lines, Inc. v. Revel*, 4 Cir. 1959, 266 F. 2d 82, 84; see also: *Hastings v. Mann*, 4 Cir. 1965, 340 F. 2d 910, 911-912; Benedict on Admiralty, section 29, page 64, 6th Edition; Gilmore & Black, The Law of Admiralty, section 6-46, page 339, 1957 Edition; and Robinson on Admiralty, section 11, page 81, 1939 Edition.



Up until the decision below, not a single case decided that the Longshoremen's Act covered a pier injury. The Court below in attempting to support its ruling has relied upon its own conception of what is fair and equitable with respect to injuries occurring on a pier. But this is a function of Congress and Congress was asked to cover pier injuries and chose not to do so.<sup>10</sup> Certainly the Court below has no right to extirpate the will of Congress by judicial legislation. As this Court said in *Pillsbury v. United Engineering Co.*, 342 U. S. 197, 96 L. ed. 225, 72 S. Ct. 223, (1952), referring to the Longshoremen's Act:

"We are aware that this is a humanitarian act, and that it should be construed liberally to effectuate its purposes; but that does not give us the power to rewrite the statute of limitations at will, and make what was intended to be a limitation no limitation at all. . . . While it might be desirable for the statute to provide as petitioners contend, the power to change the statute is with Congress, not us." (U. S. at 200, L. ed. 229)

There is also no substance in the Lower Court's reference to the Admiralty Extension Act (46 U. S. C. A. § 740), enlarging the jurisdiction of the Longshoremen's Act. This point has been exhaustably analyzed and refuted in the decision by the District Court in *Johnson v. Traynor*, *supra*. Briefly, it is pointed out there that in the Longshoremen's Act Congress deliberately used the phrase "navigable waters" in preference to the phrase "admiralty jurisdiction," which was used in the Admiralty Extension Act. That Act was not an express amendment to the Longshoremen's Act as its legislative history demonstrates. Similarly, a contemporaneous amendment of the Longshoremen's Act contains no cross-reference to the Admiralty Extension Act.

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10. See legislative history in footnote 6.

Finally, House Report No. 2287, which was submitted some 10 years after the enactment of the Extension Act, sets forth the Congressional understanding that injuries upon wharves and other extensions of land were not within the coverage of the Longshoremen's Act.

Consequently, unless the decision below is reviewed by this Court substantial misconception and confusion will persist and multiply in all the Circuits with respect to the proper interpretation of the Longshoremen's Act involving pier injuries. The lower Court's decision is a clear violation of Congressional intent and of the decisions of this Court. Certiorari should be granted and the decision below should be reversed.

### CONCLUSION.

For the foregoing reasons, as well as those stated in the petition, we respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 552

NACIRELLA OPERATING CO., INC. AND LINCOLN  
MUTUAL INSURANCE COMPANY

v.

WILLIAM H. JOHNSON, JULIA T. KLOSEK AND  
ALBERT AVERY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS JOHNSON  
AND KLOSEK IN OPPOSITION

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November 14, 1963.

U.S. District Court for the District of Maryland

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IN THE  
**Supreme Court of the United States**

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OCTOBER TERM, 1968

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No. 528

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NACIREMA OPERATING CO., INC. AND LIBERTY  
MUTUAL INSURANCE COMPANY,  
*Petitioners,*

v.

WILLIAM H. JOHNSON, JULIA T. KLOSEK AND  
ALBERT AVERY,  
*Respondents.*

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

---

**BRIEF FOR THE RESPONDENTS JOHNSON  
AND KLOSEK IN OPPOSITION**

---

**OPINIONS BELOW**

The Opinion of the Court of Appeals (pages 40a-64a of the Appendix of the Petition) is reported at 398 F. 2d 900. The Opinion of the District Court (pages 8a-31a of the Appendix of the Petition) is reported at 243 F. Supp. 184. The orders of Deputy Commissioner Traynor are set forth on pages 3a-8a of the Appendix of the Petition.

### QUESTION PRESENTED

Under contemporary admiralty concepts, does the Longshoremen's and Harbor Workers' Compensation Act cover injury or death sustained on a pier over navigable waters when the precipitating instrumentality is a shipboard crane?

### STATUTES INVOLVED

In addition to the portions of the Acts cited in the Petitions heretofore filed, Respondent respectfully calls the attention of the Court to the following section of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. 901, et seq.:

920 (Section 20 of the Act). Presumptions.

"In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter."

### STATEMENT

Together with other members of their gang, William H. Johnson and Joseph J. Klosek, longshoremen, reported to the Bethlehem Steel High Pier, Sparrows Point, Maryland, to load a cargo of steel beams aboard a sea-going freighter tied up alongside. The High Pier extends into the Patapsco River, part of the navigable waters of the United States, in a southerly direction for a distance of approximately six hundred (600) feet.

The 16-member gang turned to at 8:00 A.M. November 14, 1963; the two men were part of the four longshoremen who were working "outside" — that is, on the pier. The



beams which measured roughly forty feet in length were delivered to the ship's side in gondola railroad cars. The ship's crane was being used to pick up the drafts and load them into the holds. The casualty occurred around 4:15 P.M. Klosek and Johnson passed the chain under a draft (the beams were banded into three drafts in the gondola car in question) hooked on and started toward the side of the car to climb out.

After starting up, the draft rotated, striking Klosek and propelling him out of the gondola car onto the dock; the same draft pinned his partner, Johnson, against the side of the railroad car. Johnson recovered from his injuries with residuals; Klosek died within a few hours from his injuries. The Deputy Commissioner denied the claims on the ground the injuries were not sustained "upon navigable waters"; the District Court affirmed.

The Court of Appeals in a 5-2 en banc decision held that the injury and death were compensable under the Longshoremen's and Harbor Workers' Compensation Act and remanded the cases. Chief Judge Sobeloff, speaking for the five man majority, cited four reasons for the decision, any one of which was deemed sufficient to establish coverage under the Act. The grounds for the decision were:

1. Congress possessed the constitutional authority to cover all longshoremen injured during the loading, unloading, repairing or refitting of vessels, and exercised the full scope of its authority by designing the Act to reach all injuries sustained by longshoremen in the course of their employment; it did not intend to "freeze coverage to injuries occurring within the admiralty tort jurisdiction as it was thought to exist in 1927 . . ." (398 F. 2d at 904).

2. If, for the purpose of argument, one assumes Congress had exercised the more limited tort jurisdiction, the phrase "upon navigable waters" must be "construed to include the full range of the legislatively and judicially expanded concept of maritime jurisdiction" (398 F. 2d at 906).

3. Small vessels are able to navigate beneath the piers. "These waters are therefore navigable in fact" (398 F. 2d at 908).

4. This Honorable Court has twice mandated the humanitarian Act "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results . . ." and has admonished "(those) subject to the same danger . . . (are) entitled to like treatment under law." The Court of Appeals also adverted to the observations of Judge Soper that "the references therein to 'maritime employment' and the injury 'upon the navigable waters of the United States . . .' should be broadly construed," and that the coverage of the Act "should not be frustrated by needless refinements" (398 F. 2d at 906-909).

With the above elaboration, Respondents accept the "Statement" contained in the Government's Petition.

### REASONS FOR DENYING THE WRIT

Respondents oppose the granting of the writ, particularly in the Klosek case, because this decision is consonant with decisions in other circuits which have held that when a longshoreman is lifted off the level of the pier and dropped, his injuries or death are compensable under the Act. The first decision to this effect was handed down in 1931 in *L'Hote v. Crowell*, 54 F. 2d 212 (5 Cir.). In *The Admiral Peoples*, 295 U.S. 648, 79 L. Ed. 1633, this Court explained that it had reversed on the question of dependency but

left undisturbed the jurisdictional determination (of *L'Hote*) that the injury was covered by the Act (295 U.S., at 653).

If, for policy considerations or because of the general importance of the matter to the uniform administration of the Act, the Court feels disposed to grant the writ, it is respectfully submitted the writ should be granted and the decision of the Court of Appeals affirmed per curiam without assigning the case for plenary consideration and argument, for the following reasons:

1. The decision below is plainly correct, supported by both logic and the philosophy of current admiralty concepts as enunciated by this Court. It is significant that the government did not attack the fairness, the legal correctness or the social desirability of the holding in its petition. After calling attention to the existing conflict in the circuits and the disparity of benefits that would result therefrom, the Solicitor General requested this Court to resolve the question because of its "general importance".

It is also illuminating to observe that — exclusive of *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 — of the other six Supreme Court decisions cited in the *Amici Curiae* Brief of National Association of Stevedores, et al., the most recent was decided in 1952; the dates of the others are 1917, 1920, 1922, 1924, and 1946. The Petition of Nacirema Operating Co., Inc., et al. contains no citation to a Supreme Court case other than *Calbeck*.

As former Chief Judge Sobeloff pointed out, "Regardless of the route traveled, we arrive at the conclusion that the injuries of all four longshoremen are embraced by the Act" (398 F. 2d at 908). The bases of the lower court's decision were itemized in the "Statement" portion of this Brief, *supra*.

2. The lower court correctly interpreted the legislative history of the Longshoremen's Act. This aspect of the case was thoroughly researched and argued below. The Petitioners filed a Supplemental Brief seven pages of which dealt exclusively with the legislative history of the Act. These Respondents filed a Supplemental Brief thirteen pages of which were devoted to the Act's legislative history.

After calling attention to the fact the Act by its own terminology was designated as one to provide compensation for disability or death incurred in certain "maritime employments", the opinion below traced the discussions in the hearings and pointed out that all the interested principals — the unions, the shipping industry and the Labor Department — testified in support of an act that would cover all injuries of maritime workers (398 F. 2d at 903).

In the final debate on the Act, shortly before it was enacted into law by a vote of 265 to 7, Congressman LaGuardia offered this explanation of the Act and its purpose:

"This law simply gives the longshoremen the benefit of up-to-date legislation to cover injuries sustained in the course of their employment. That is all there is to it." 68th Cong. Rec. 5414. (398 F. 2d at 905).

The lower Court then observed that theorizing was no longer necessary since this Court authoritatively resolved the question in *Calbeck*. It went on to quote excerpts from that opinion, the most pregnant of which were:

". . . Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject matter. \* \* \* . . . Congress intended the compensation act to have a coverage co-extensive with the limits of its authority". 370 U.S. at 130. (398 F. 2d at 905).

3. The court below was correct in concluding that the Admiralty Extension Act expanded the coverage of the Longshoremen's Act.

As authority for its conclusion in this regard, the lower court relied on *Calbeck* and also cited the *Michigan Mutual Liability Co. v. Arrien*, 233 F. Supp. 496 (S.D., N.Y., 1964); *Boston Metals Co., et al. v. O'Hearne*, D.C., Md., Admiralty No. 4412 (unreported at District level, June 20, 1963); *Interlake S.S. Co. v. Nielsen*, 338 F. 2d 879, 882-883 (6 Cir., 1965); *Spann v. Lauritzen*, 344 F. 2d 204 (3 Cir., 1965) (by implication); *Puget Sound Bridge & Dry Dock Co. v. O'Leary*, 260 F. Supp. 260 (W.D. Wash., 1966) cases.

The above comments have been made in response to the points set forth in paragraph 4 of Petitioner Nacirema's "Reasons for Granting the Writ". We offer the following affirmative reasons for affirming the decision of the Court of Appeals:

A. The Act is remedial legislation and should be applied with the utmost liberality to avoid harsh and incongruous results.

One of the early cases in which this Court expressed its solicitude for the safety and welfare of employees engaged in the hazardous occupation of longshoring was *International Stevedoring Co. v. Haverty*, 272 U.S. 50, decided October 18, 1926, before the enactment of the Longshoremen's statute. From *Voris v. Eikel*, 346 U.S. 328, 98 L. Ed. 5 (The Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.) and *Avondale Marine Ways, Inc. v. Henderson*, 346 U.S. 366, 98 L. Ed. 77 (A death on a marine railway 400 feet inland from the water's edge was held compensable under the Act.) (both decided in 1953).

Through *Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25, 15 L. Ed. 2d 21 (Defense Bases Act, 1965); (On June 11, 1962 this Court denied certiorari. On October 18, 1965 it granted the petition for rehearing, vacated the earlier denial of certiorari and reinstated the award of compensation.) To *Jackson v. Lykes Bros. Steamship Co., Inc.*, 386 U.S. 731, 18 L. Ed. 2d 488 (1967) (The widow of a longshoreman was permitted to bring a suit against the shipowner who was the direct employer of the decedent.) and *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 20 L. Ed. 2d 30 (April 1, 1968), (Section 22 of the Act was liberally interpreted to permit a widow of a longshoreman to file and recover on a second claim after her first claim was rejected.) there has been a steady procession of cases in which the Act has been applied with considerable liberality.

This humanitarian concern for the plight of the longshoreman is equally evident in third party actions. Among some of the recent landmark decisions in this field may be mentioned: *Crumady v. The J. H. Fisser*, 358 U.S. 423 (1959); (The negligent setting of a control device on a seaworthy winch rendered the vessel unseaworthy and supported a judgment in favor of the longshoreman.) *Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272, 3 L. Ed. 2d 292 (1959); (An injury within the "twilight zone" entitles the longshoreman to select the more favorable compensation Act and other concomitant remedies.) *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206, 10 L. Ed. 2d 297 (1963); (A longshoreman injured by slipping on beans from a broken bag in a pier shed several hundred feet from the ship's side may recover against the ship on ground of unseaworthiness.) *Reed v. Steamship Yaka*, 373 U.S. 410, 10 L. Ed. 2d 448 (1963); (A longshoreman may maintain an unseaworthiness suit against the vessel although he is

employed directly by the bareboat charterer.) *Mascuilli v. United States*, 387 U.S. 237, 18 L. Ed. 2d 743 (1967). (The widow of a longshoreman was held entitled to recover against the vessel for her husband's death caused solely by the negligent operation of the longshoring gang.)

If third party liability, with its open end recoveries, is to be applied most liberally in favor of longshoremen, a fortiori the closed end Compensation Act, expressly passed for their protection, should be so applied.

When dealing with the claims of seamen, whether the injuries were sustained on an offshore platform, ashore in a taxicab or aboard ship, the court has evidenced the same paternal concern. As a sampling of the protective decisions, we cite: *Grimes v. Raymond Concrete Pile Company*, 356 U.S. 252, 2 L. Ed. 2d 737 (1958); (An injured pile driver employed in connection with the installation of a radar tower was held eligible to sue as a seaman under the Jones Act.) *Butler v. Whiteman*, 356 U.S. 271, 2 L. Ed. 2d 754 (1958) (Inferences drawn from skimpy evidence were sufficient to support a recovery of a widow of odd job wharf laborer on the ground he was a seaman.) *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 4 L. Ed. 2d 941 (1960) (The shipowner's liability for unseaworthiness is completely divorced from concepts of negligence.) *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 5 L. Ed. 2d 20 (1960) (Seaman injured when he dropped on his toes a worn and defective wrench he was using may recover on the ground of unseaworthiness.) *Vaughan v. Atkinson*, 369 U.S. 527, 8 L. Ed. 2d 88 (1962) (A seaman is entitled to counsel fees when a shipowner wilfully and persistently defaults in its obligation to pay maintenance and cure.) *Tipton v. Socony Mobil Oil Company, Inc.*, 375 U.S. 34, 11 L. Ed. 2d 4 (1963) (The fact an offshore drilling

employee received benefits under the Longshoremen's Act is not admissible in his suit as a seaman under the Jones Act.) *Hopson v. Texaco, Inc.*, 363 U.S. 262, 15 L. Ed. 2d 740 (1960) (A sick seaman being taken to a United States consul and injured ashore through the negligent operation of a taxicab procured by the ship's Master may recover under the Jones Act.) *Pure Oil Company v. Suarez*, 304 U.S. 202, 16 L. Ed. 2d 474 (1966) (The venue provisions of the Jones Act were applied most liberally to sustain a seaman's suit.) and *Waldron v. Moore-McCormack Lines, Inc.*, 306 U.S. 724, 18 L. Ed. 2d 482 (1967) (If too few men are assigned to do a job a seaman may sue the vessel on the grounds of unseaworthiness.)

The longshoreman should not be subjected to "pendulum" jurisdiction and justice, swinging back and forth between state and federal jurisdiction, as he performs his duties and takes his relief breaks aboard ship and on the adjacent pier.

B. Our government — and its courts — have been notoriously jealous of their admiralty jurisdiction and their dominion over "navigable waters".

In the *Amici Curiae* Brief counsel for the majority of the stevedoring contractors throughout the country asserts that when a pier is completed the "water over which it is built is permanently removed from navigation . . ." (p. 5). The zealotness of the courts in guarding the country's rights in navigable waters and related matters is evident from their insistence of the recognition of "the public property of the nation" and the "dominant servitude" in favor of the government. Some illustrative decisions are: *Economy Light & Power Co. v. United States*, 256 U.S. 113, 45 L. Ed. 847 (1920); *United States v. Holt State Bank*, 270



U.S. 49 (1925); *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 85 L. Ed. 243 (1941); *Federal Power Commission v. Union Electric Company*, 301 U.S. 90, 14 L. Ed. 2d 728 (1965); *United States v. Rands*, 389 U.S. 121, 19 L. Ed. 2d 329 (1967) and *Hughes v. Washington*, 309 U.S. 290, 19 L. Ed. 2d 530.

The court below correctly asserted that this Court has expressly held "when once found to be navigable, a waterway remains so." (*United States v. Appalachian, and Economy Light v. United States*, *supra*.) After quoting this excerpt from *The Daniel Ball*, 10 Wall. 557, 77 U.S. 557, 19 L. Ed. 999 (1870): "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce . . .", the lower court went on to concur in the sound conclusion of Judge Waterman in *Rochester Gas and Electric Corp. v. F. P. C.*, 344 F. 2d 594 (2 Cir., 1965) that a body of water is "navigable water" if:

"(1) it presently is being used or is suitable for use, or (2) it has been used or was suitable for use in the past, or (3) it could be made suitable for use in the future by reasonable improvements." (398 F. 2d at 908)

See also, the definition of "navigable waters" contained in Title 16, Section 796 of the United States Code which includes in the term "interruption falls, shallows, or rapids" compelling land carriage.

### CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied. If granted, the reversal of the judgments adverse to Respondents should be affirmed per curiam, without plenary consideration by this Court

and the cases remanded to the District Court for the entry of judgments consistent with the opinion of the Court of Appeals.

Respectfully submitted,

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November 14, 1968.

No. 9

Copy for respondent Avery filed  
on Nov. 16, 1968.  
(not printed)

No. 9

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JOHN F. DAVIS, CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1968

No. ~~122~~ 9

NACIREMA OPERATING CO., INC. AND LIBERTY  
MUTUAL INSURANCE COMPANY,  
*Petitioners,*

v.

WILLIAM H. JOHNSON, JULIA T. KLOSEK  
AND ALBERT AVERY,  
*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE FOURTH CIRCUIT

**BRIEF FOR THE PETITIONERS**

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January 23, 1969

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IN THE  
**Supreme Court of the United States**

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OCTOBER TERM, 1968

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**No. 528**

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**NACIREMA OPERATING CO., INC. AND LIBERTY  
MUTUAL INSURANCE COMPANY,**

*Petitioners,*

v.

**WILLIAM H. JOHNSON, JULIA T. KLOSEK  
AND ALBERT AVERY,**

*Respondents.*

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE FOURTH CIRCUIT**

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**BRIEF FOR THE PETITIONERS**

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**OPINIONS BELOW**

The opinion of the Court of Appeals for the Fourth Circuit is reported in 398 F. 2d 900 (A. 42).<sup>1</sup> The opinion of the United States District Court for the District of Maryland is reported in 243 F. Supp. 184, 1965 A.M.C. 1825 (A. 11). The opinion of the United States District Court for the Eastern District of Virginia, Norfolk Division, is reported in 245 F. Supp. 51, 1965 A.M.C. 2231 (A. 35).

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<sup>1</sup> The designation "A" refers to the separate Appendix.

## JURISDICTION

The judgments of the Court of Appeals for the Fourth Circuit in consolidated cases Nos. 528 and 663 were entered June 20, 1968 (A. 65, 66, 67). The petition in No. 528 was filed September 16, 1968. On September 9, 1968, by order of Mr. Justice Black, the time within which to file a petition for a writ of certiorari in No. 663 was extended to and including October 18, 1968. The petition in No. 663 was filed on October 17, 1968. The petitions in Nos. 528 and 663 were granted December 9, 1968. The jurisdiction of this Court is invoked under 28 U.S.C.A., §1254 (1).

## STATUTES INVOLVED

The statutes involved are:

1. Longshoremen's and Harbor Workers' Compensation Act as amended, 33 U.S.C.A., §903(a):

"Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof."

2. Admiralty Extension Act of 1948, 46 U.S.C.A., §740:

"The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of

damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

"In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: *Provided*, That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948, and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: *Provided further*, That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage."

### QUESTIONS PRESENTED

1. Whether an injury sustained by a longshoreman while working on a pier is one which occurred upon the navigable waters of the United States and is thus within the coverage of the Longshoremen's & Harbor Workers' Compensation Act.

2. Whether the Admiralty Extension Act of 1948 broadens the jurisdiction of the Longshoremen's and Harbor Workers' Compensation Act to include injuries sustained while working on the land.

### STATEMENT OF THE CASE

These consolidated cases arose out of pier injuries to three longshoremen, one of whom died, in accidents occurring under almost identical circumstances. The jurisdiction of the district courts was invoked under 33 U.S.C.A., Sec. 921(b) as all three accidents involved compensation

claims and a review of separate compensation orders in which the deputy commissioners held the claims were not covered by the Longshoremen's Act.

William H. Johnson and Joseph J. Klosek, longshoremen, employees of Nacirema Operating Co., Inc., were working in a gondola car on the Bethlehem Steel High Pier, Sparrows Point, Maryland, as members of a gang of longshoremen engaged to load steel beams aboard the SS BETHTEX on November 14, 1963. As "slingers" it was their job to secure beams stowed in the car to a fall attached to one of the ship's cranes so that the drafts could be picked up and loaded into the vessel's holds. At approximately 4:15 p.m., a draft which was raised swung, knocked Klosek out of the car onto the pier and pinned Johnson against the side of the car. Klosek died some hours later as a result of the injuries he sustained.

Similarly, Albert Avery, a longshoreman in the employ of Old Dominion Stevedoring Co., insured by Liberty Mutual Insurance Company, was working in a gondola car on Pier B, City Piers, Norfolk, Virginia, on December 28, 1961. Avery, like Johnson and Klosek, was a "slinger" and was engaged in hooking ship's gear to a draft of logs. He was injured when the draft struck him and crushed him against the side of the car.

The Johnson and Klosek cases were heard simultaneously by Deputy Commissioner John P. Traynor, Fourth Compensation District, as the injuries and death resulted from the same accident. In separate compensation orders Deputy Commissioner Traynor rejected the two claims under the Longshoremen's Act, stating that neither the employment nor the injuries sustained took place upon the navigable waters of the United States (A. 2, 5).

Appeals from the two compensation orders of Deputy Commissioner Traynor were argued together in the United States District Court for the District of Maryland and the orders were affirmed. (*Johnson v. Traynor*, 243 F. Supp. 184 [D. Md. 1965]; A. 11). The district judge agreed that the accidents had not occurred upon navigable waters and further found that the jurisdiction of the Longshoremen's Act had not been extended by the Admiralty Extension Act of 1948.

Deputy Commissioner Jerry C. Oosting entertained the claim for compensation benefits in the Albert Avery case upon a stipulation of the facts and by formal order rejected the claim assigning as his reason therefor that the injury sustained by the claimant did not occur on the navigable waters of the United States within the meaning of the Longshoremen's and Harbor Workers' Compensation Act (A. 9).

Thereafter, the claimant appealed the decision of the Deputy Commissioner to the United States District Court for the Eastern District of Virginia, Norfolk Division. The District Court affirmed the decision of the Deputy Commissioner determining that inasmuch as the injury occurred on a pier, an extension of the land, it did not occur upon the navigable waters of the United States. The District Court further decided that the Admiralty Extension Act of 1948 was inapplicable and that it did not extend the jurisdiction of the Longshoremen's Act, (*East v. Oosting*, 245 F. Supp. 51 [E.D. Va. 1965]; A. 35).

The three cases, Johnson, Klosek and Avery, were appealed. The court below after first having heard the cases in separate panels felt the questions involved were of suffi-

cient importance to warrant being heard by the entire court. Of its own motion, therefore, reargument en banc was ordered by the court, the cases were consolidated for rehearing together with one other case for which no petition for certiorari was sought, and the cases were reargued together. In a 5-2 decision, the court below reversed the judgments of the district courts.

Subsequently, in No. 528, counsel for Nacirema Operating Company and Liberty Mutual Insurance Company applied to this Court for certiorari and the Solicitor General, on behalf of the Deputy Commissioners, likewise applied for certiorari. The petitions were granted, the cases were consolidated and are thus before the Court.

### SUMMARY OF ARGUMENT

Piers have without exception been held to be extensions of the land; therefore, a pier injury cannot under any circumstances have occurred "upon the navigable waters of the United States", as required by Section 3 of the Longshoremen's Act (33 U.S.C.A., Sec. 903(a)). *Swanson v. Marra Bros., Inc.*, 328 U.S. 1 (1946); *Hastings v. Mann*, 340 F. 2d 910 (4th Cir. 1965), *cert. den.*, 380 U.S. 963 (1965).

Until the decision below, no court has ever held that pier injuries are covered by the Longshoremen's Act. This Court very recently denied certiorari in three cases, arising in the Fifth and Ninth Circuits, which reached the precise opposite result from that of the Fourth Circuit. *Travelers Ins. Co. v. Shea*, 382 F. 2d 344 (5th Cir. 1967), *cert. den.*, 389 U.S. 1050 (1968) *sub nom.*, *McCullough v. The Travelers Ins., Co.*; *Nicholson v. Calbeck*, 385 F. 2d 221 (5th Cir. 1967), *cert. den.*, 389 U.S. 1051 (1968), and *Houser*

*v. O'Leary*, 383 F. 2d 730 (9th Cir. 1967), *cert. den.*, 390 U.S. 954 (1968).

The legislative history of the Longshoremen's Act also refutes the lower court's holding that the Act is "status" oriented (that is, related to the job, or the contract) rather than "situs" oriented (related to the location of the injury). Though there were certainly proponents of the idea that the Act should cover all water front workmen for injuries sustained during the course of their employment, the Act did not so provide when passed. The distinct understanding of the legislature was clearly stated in Senate Report No. 973, 69th Congress, 1st Session, p. 16:

" . . . injuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship. . . ." (Emphasis supplied.)

Even though the Act is a humanitarian act, and though it might be felt desirable for it to provide as the longshoremen contend, "the power to change the statute is with Congress . . .", not the courts. *Pillsbury v. United Engineering Co.*, 342 U.S. 197, 200 (1952).

Though the court below suggests that the Admiralty Extension Act of 1948, 46 U.S.C.A., Sec. 740, has extended the coverage of the Longshoremen's Act to land injuries, the plain language of the Extension Act and its legislative history negative such a conclusion. The Extension Act applies to *suits in rem* and *in personam*. Admiralty tort jurisdiction was thus extended to land if the injury was caused by a vessel. The Longshoremen's Act, on the other hand, is purely an administrative proceeding, a compensation act not concerned with damages, administered by the Deputy Commissioners in the Department of Labor in proceedings which begin by the filing of an administrative claim rather than a libel or complaint.

If there had been any intention on the part of the Congress to amend the Longshoremen's Act by the Extension Act, surely there would have been a cross-reference in one or the other of the acts, but none exists. And ten years after the passage of the Extension Act Congress noted its clear understanding that pier injuries are covered by state laws, while injuries occurring upon navigable waters of the United States are covered by the Longshoremen's Act. House Report No. 2287, *infra*, pp. 19, 20, provides in pertinent part:

“[The Longshoremen's Act provides compensation for injuries to longshoremen and certain other water front workmen when they are working] *on the navigable waters of the United States*, including dry docks. *These employees are subject to the protection of State safety standards when performing work on docks and in other shore areas.*” (Emphasis supplied.)

That the Longshoremen's Act was never intended to embrace the broader area of admiralty jurisdiction is manifest in the deliberate substitution of the words “upon the navigable waters” for the words “within the admiralty jurisdiction” as originally proposed in 1927 when the Longshoremen's Act was enacted.

The area between navigable and unnavigable waters — clearly the separation point between Longshoremen's Act coverage and state coverage — referred to as the “twilight zone”, has, through years of litigation since the passage of the Act in 1927, been narrowed to as precise an area as reason, logic and careful judicial interpretation will permit. If the decision of the court below is upheld, a veritable Pandora's box of litigation will ensue, totally nullifying the present, carefully drawn line circumscribing the twilight zone.



## ARGUMENT

### I.

A LONGSHOREMAN INJURED WHILE WORKING ON A PIER PERMANENTLY ATTACHED TO THE LAND IS NOT ENTITLED TO COMPENSATION UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT BECAUSE THE INJURY DID NOT OCCUR UPON THE NAVIGABLE WATERS OF THE UNITED STATES.

The jurisdiction of the Deputy Commissioner over claims for compensation granted by the Longshoremen's and Harbor Workers' Compensation Act (hereinafter called the Longshoremen's Act) contains a clear territorial limitation. His jurisdiction extends only to injuries occurring upon the navigable waters of the United States. The applicable section of the Longshoremen's Act is found in 33 U.S.C.A., Section 903(a), which provides in pertinent part:

"(a) Compensation shall be payable under this Chapter in respect of disability or death of an employee, *but only if the disability or death results from an injury occurring upon the navigable waters of the United States* (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. . . ." (Emphasis supplied.)

Section 903(a) is the only source of jurisdiction of the Deputy Commissioner in the Longshoremen's Act. No other grant of such jurisdiction exists. Therefore, injuries which do not occur upon navigable waters are compensable only under state compensation laws.

It is not disputed that William H. Johnson and Joseph J. Klosek were working in a railroad gondola car on the Bethlehem Steel Company High Pier when they were struck by the draft. Similarly, Avery was working in a gondola car on a pier in Norfolk, Virginia. The piers in question extended from the land out over waters which

were once navigable and might still be navigable for small boats.

For over one hundred years this Court and every other court to which the question has been submitted have consistently held that piers such as the ones involved in this case are extensions of the land; that accidents occurring on them are not within the admiralty tort jurisdiction but are governed exclusively by state law. *Swanson v. Marra Bros., Inc.*, 328 U.S. 1 (1946); *Minnie v. Port Huron Terminal Co.*, 295 U.S. 647 (1935); *T. Smith & Son, Inc. v. Taylor*, 276 U.S. 179 (1928); *State Industrial Commission v. Nordenholt Corp.*, 259 U.S. 263 (1922); *Cleveland Terminal & Valley R.R. Co. v. Cleveland S.S. Co.*, 208 U.S. 316 (1908); *The Plymouth*, 70 U.S. (3 Wall.) 20 (1865); *Houser v. O'Leary*, 383 F. 2d 730 (9th Cir. 1967), cert. den., 390 U.S. 954 (1968); *O'Keeffe v. Atlantic Stevedoring Co.*, 354 F. 2d 48 (5th Cir. 1965); *Michigan Mut. Liab. Co. v. Arrien*, 344 F. 2d 640 (2nd Cir. 1965), cert. den., 382 U.S. 835 (1965); *Hastings v. Mann*, 340 F. 2d 910 (4th Cir. 1965), cert. den., 380 U.S. 963 (1965); *Wiper v. Great Lakes Engineering Works*, 340 F. 2d 727 (6th Cir. 1965), cert. den., 382 U.S. 812 (1965); *American Export Lines, Inc. v. Revel*, 266 F. 2d 82 (4th Cir. 1959); *O'Loughlin v. Parker*, 163 F. 2d 1011 (4th Cir. 1947), cert. den., 333 U.S. 868 (1948); *Johnston v. Marshall*, 128 F. 2d 13 (9th Cir. 1942), cert. den., 317 U.S. 629 (1942); 1 BENEDICT ON ADMIRALTY § 29 (6 ed.); GILMORE & BLACK, THE LAW OF ADMIRALTY § 6-46 (1957 ed.); ROBINSON ON ADMIRALTY § 11 (1939 ed.).

In *State Industrial Commission v. Nordenholt Corp.*, 259 U.S. 263 (1922), this Court held that a longshoreman who was injured while unloading a vessel lying in navigable waters when he slipped and fell on the dock, had been injured on the land and that recovery for such an injury was therefore governed by the state workmen's compensation

act rather than by the general maritime law. And in *T. Smith & Son, Inc. v. Taylor*, 276 U.S. 179 (1928), a longshoreman, working on a stage on the dock which projected over the water to or near the ship, was struck by a sling load of cargo, knocked into the water and subsequently found dead. The Court held that the impact of the sling, which caused the death, occurred on the pier, which is an extension of the land; therefore, it was proper for the widow of the decedent to be awarded compensation under the state law.

Consequently, injuries sustained on a pier are not covered by the Longshoremen's Act since they did not occur upon navigable waters. This Court so held in *Swanson v. Marra Bros., Inc.*, 328 U.S. 1 (1946), a landmark decision which has never been questioned to this day. Swanson was a longshoreman working on a pier loading cargo on a ship lying alongside and was injured when a life raft fell from the vessel and struck him. The question before the Court was whether he had a right of action against his employer under the Jones Act while he was working on shore. This Court was therefore called upon to interpret the relationship of the Longshoremen's Act and the Jones Act and it did so in the following language (328 U.S. 1, 7):

"We must take it that the effect of these provisions of the Longshoremen's Act is to confine the benefits of the Jones Act to the members of the crew of a vessel plying in navigable waters and to substitute for the right of recovery recognized by the *Haverty* case only such rights to compensation as are given by the Longshoremen's Act. But since this act is restricted to compensation for injuries occurring on navigable waters, it excludes from its own terms and from the Jones Act any remedies against the employer for injuries inflicted on shore. The act leaves the injured employees in such cases to pursue the remedies afforded by the local law, which this Court has often held permits re-

covery against the employer for injuries inflicted by land torts on his employees who are not members of the crew of a vessel." (Emphasis supplied.)

The United States Courts of Appeal for the Fifth and Ninth Circuits have recently held that pier injuries are not covered by the Longshoremen's Act. *Travelers Ins. Co. v. Shea*, 382 F. 2d 344 (5th Cir. 1967), *cert. den.*, 389 U.S. 1050 (1968) *sub nom.*, *McCullough v. The Travelers Ins. Co.*; *Nicholson v. Calbeck*, 385 F. 2d 221 (5th Cir. 1967), *cert. den.*, 389 U.S. 1051 (1968), *mot. for leave to file pet. for rehearing den.*, ..... U.S. ...., 89 S. Ct. 67 (1968), and *Houser v. O'Leary*, 383 F. 2d 730 (9th Cir. 1967), *cert. den.*, 390 U.S. 954 (1968).

The only decision to the contrary is that of the Fourth Circuit. Although the District Courts, in holding that the injuries in the cases at bar were not covered by The Longshoremen's Act, based their decisions in part on the fact that piers are extensions of the land; and although this point was emphasized in the briefs of the present petitioners, the stevedoring companies and the Government, it was not even mentioned, let alone discussed, in the opinion below. It is submitted that the only possible explanation is that the Fourth Circuit was unable to answer this argument, particularly since it had so held in two recent decisions. In *American Export Lines, Inc. v. Revel*, 266 F. 2d 82, 84 (1959), the Court of Appeals for the Fourth Circuit clearly stated the proposition which it now declines to espouse:

"Since Revel was injured while standing on the dock, (an extension of the land) his remedies are restricted to those afforded by the local law. *Swanson v. Marra Bros.*, 1946, 328 U.S. 1, 66 S. Ct. 869, 90 L. Ed. 1045; *State Industrial Comm. v. Nordenholt Corp.*, 1922, 259 U.S. 263, 42 S. Ct. 473, 66 L. Ed. 933; Cf. The Longshoremen's and Harbor Workers' Compensation Act, 33

U.S.C.A. §903 and *Kermarec v. Compagnie Generale Transatlantique*, 1959, 358 U.S. 625, 79 S. Ct. 406, 3 L. Ed. 2d 550. This is true even though the Congress has embraced such cases within the maritime jurisdiction of the United States. Extension of Admiralty Act, 46 U.S.C.A. §740."

Later, in *Hastings v. Mann*, 340 F. 2d 910 (1965), cert. den., 380 U.S. 963 (1965), a patron of a small boat marina was injured while using a launching ramp to float his boat. When the accident occurred, he was standing on the ramp in the navigable waters of Pamlico Sound. The Court of Appeals for the Fourth Circuit said at page 912 of 340 F. 2d:

"The fact that the libelant's feet were awash, when he slipped and fell on the ramp, does not alter the nature and character of the ramp or enlarge Admiralty's jurisdiction to award damages for injuries occurring upon it. . . .

". . . If his feet are awash, he is still standing upon an extension of the land in the same sense as is a worker upon a pier, who, when injured, is well seaward of both high and low water.

"We think the District Court properly concluded that, since the submerged portion of the launching ramp was firmly affixed to the land, it is an extension of the land, and the plaintiff's injury is not cognizable in Admiralty."

The majority below, in footnote 11 appearing in the Appendix at pages 52, 53, stated that to the extent its opinion deviated from its earlier opinion in *American Export Lines, Inc. v. Revel*, *supra*, the court felt that *Revel* had been overruled by *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114 (1962). It is worthy of note that both *Revel* and *Hastings* held that a pier is an extension of the land and that *Hastings* was decided after *Calbeck*. It is therefore apparent that when the court below decided *Hastings* it did not at that time feel that the *Calbeck* decision, which

had been earlier decided by the Supreme Court, had decided anything to conflict with its view that a pier injury was anything other than a land injury; and the court below, nowhere in its opinion, goes so far as to maintain that a land injury is covered by the Longshoremen's Act.

*A. The Longshoremen's Act Has Always Been Held  
To Be Situs Oriented Rather Than  
Status Oriented.*

The divided Court of Appeals for the Fourth Circuit, in the decision below, erroneously concluded that coverage under the Longshoremen's Act depended upon status (that is, the workmen's occupation) rather than situs (the location of the injury).

In his strong dissent to the majority opinion below, Chief Judge Haynsworth said: "... [B]ut the 'status theory', as opposed to the 'situs theory', has been firmly rejected by every court that has ever considered it until now the majority embraces it..." (A. 61).

In only one instance did Congress extend the Longshoremen's Act to the land; that was in Section 3(a) in the case of any "dry dock". No other type dock or pier was or has been referred to and the distinction was commented upon in *Continental Casualty Co. v. Lawson*, 64 F. 2d 802, 304 (5th Cir. 1933). See the discussion in *Avondale Marine Ways v. Henderson*, 346 U.S. 366 (1953), wherein Mr. Justice Douglas held that a marine railway was a dry dock within the meaning of the Longshoremen's Act.

## II. .

**THE LEGISLATIVE HISTORY OF THE LONGSHOREMEN'S ACT  
MAKES IT CLEAR THAT PIER INJURIES WERE INTENTIONALLY  
EXCLUDED FROM THE COVERAGE OF THE ACT.**

Before the passage of the Longshoremen's Act there were a number of decisions of this Court, between the years 1917

and 1924, which had held that state workmen's compensation acts could not constitutionally be applied to those workmen, longshoremen, who were injured while working on board ship or upon a gangway between a vessel and the pier. The leading case was *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), which held that state compensation acts could not cover an injury to a longshoreman which occurred on a gangplank between a pier and a vessel. Subsequent efforts of Congress to delegate to the states powers to pass such acts were struck down (*Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Washington v. W. C. Dawson & Co.*, 264 U.S. 219 (1924)). As a result, the Longshoremen's Act was proposed and testimony as to what accidents the Act should cover and what its phraseology should be was given before the legislative committees to which the Act was referred. Some witnesses were anxious to have the Act cover accidents to longshoremen whether they occurred on the ship or on the land and such was stated to be "the earnest desire" of the Commissioner of Labor (Hearings on S. 3170, Senate Judiciary Committee, 69th Cong., 1st Sess., March 16 and April 2, 1926, p. 40; A. 18, 19), while others urged that the Act be limited to accidents to which state compensation acts could not constitutionally be applied.

The Longshoremen's Act, as originally introduced, contained a provision covering "any employment performed on a place within the *admiralty jurisdiction* of the United States, except employment of local concern and of no direct relation to navigation and commerce". (Senate Hearings, p. 2; emphasis supplied.) That language did not remain, however, and after considerable discussion over the advisability of the "local concern" exception, the exception was omitted and the words "navigable waters" were substituted for the words "admiralty jurisdiction". Surely

there would have been no need for the substitution of one term for the other if Congress had considered the phrases synonymous (A. 21). S. Rep. No. 973, 69th Cong., 1st Sess., at page 16 states:

"The purpose of this bill is to provide for compensation, in the stead of liability, for a class of employees commonly known as 'longshoremen.' These men are mainly employed in loading, unloading, refitting, and repairing ships; but it should be remarked that *injuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship* so as to bring them within the maritime jurisdiction of the United States." (Emphasis supplied.)

Under these circumstances, Judge Watkins, in his decision in the District Court for the District of Maryland, held that "[c]overage of injuries occurring on the wharf was advertently omitted" and said that the "earnest desire" of the Commissioner of Labor was not realized (A. 19, 20). Messrs. Gilmore and Black reached the same conclusion, for they stated:

"The exclusion of on-shore injuries to maritime employees otherwise within the Act may have reflected doubts as to Congressional power, in a statute passed under the Constitutional grant of admiralty jurisdiction to go beyond the highwater mark, or it may have been a policy decision to leave as much as possible to the state compensation commissions." (Gilmore & Black, *The Law of Admiralty*, page 339, 1957 Edition.)

Chief Judge Haynsworth put this forcefully in his strong dissent:

". . . The phrasing of the statute, as well as its history, shows a rejection, not an adoption, of the suggestion of the Department of Labor that the contract be covered rather than places. Had it been intended to adopt the contract theory, the statutory language 'on the navigable waters' could hardly have been more inap-



propriate for effectuation of that intention. The words, introduced as a substitution for the words, 'within the admiralty jurisdiction,' require a 'situs' approach, as all courts have held or assumed, not a 'status' approach" (A. 62).

This Court, in *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962), pointed out on four separate occasions that the Longshoremen's Act was only intended to cover injuries which occurred "on navigable waters". The Court said:

"Our conclusion is that Congress invoked its constitutional power so as to provide compensation for all injuries sustained by employees on navigable waters (370 U.S. at 117).

"There emerges from the complete legislative history a congressional desire for a statute which would provide federal compensation for all injuries to employees on navigable waters; (370 U.S. at 120).

"In sum, it appears that the Longshoremen's Act was designed to ensure that a compensation remedy existed for all injuries sustained by employees on navigable waters, (370 U.S. at 124).

"We conclude that Congress used the phrase 'if recovery . . . may not validly be provided by State law' in a sense consistent with the delineation of coverage as reaching injuries occurring on navigable waters. By that language Congress reiterated that the Act reached all those cases of injury to employees on navigable waters as to which Jensen, Knickerbocker and Dawson had rendered questionable the availability of a state compensation remedy" (370 U.S. at 126).

Judge Watkins commented that the Court used the term "on navigable waters" on eleven separate occasions in the body of the opinion and gave the page references (A. 30).

As Judge Watkins stated (A. 22) administrative interpretations of the Longshoremen's Act, while not controlling are certainly not without significance. Since the Act took

effect on July 1, 1927, the Bureau of Employees' Compensation of the United States Department of Labor has consistently interpreted the Act to leave wharfside injuries to state coverage. From time to time official opinions interpreting the Act have been published and in Opinion No. 16, September 30, 1927, (1927 A.M.C. 1855), the Commission administering the Act held that a longshoreman injured on a dock when struck by the ship's tackle in the process of loading a vessel, knocked from the dock onto the vessel, was not covered by the Longshoremen's Act but was instead covered by the state act. There are thirty-four such official opinions which are reprinted in 1927 A.M.C. 1550-1574, 1855-1860; 1928 A.M.C. 256-268, 404-425, 573 and 1929 A.M.C. 100.

The Department of Justice, in *every* case in which it has participated (including these consolidated cases) has taken the position that the Act does not cover injuries occurring on a pier.

### III.

#### THE ADMIRALTY EXTENSION ACT OF 1948 DOES NOT ENLARGE THE COVERAGE OF THE LONGSHOREMEN'S ACT.

The respondent longshoremen and the majority below have erroneously injected the Admiralty Extension Act of 1948 into the case. They contend that Act, which enlarges the admiralty tort jurisdiction to certain injuries which occur ashore if caused by a vessel, has at the same time extended the coverage of the Longshoremen's Act to injuries which occur on land.

Chief Judge Haynsworth, dissenting below (A. 62, 63), succinctly summarized the legislative history of both the Admiralty Extension Act and the Longshoremen's act showing conclusively that the Extension Act was never intended

to supplement, enlarge or in any way amend the Longshoremen's Act:

"... As Judge Watkins pointed out in one of the opinions from which these appeals come, no such intention is evident in the Admiralty Extension Act, its legislative history or the subsequent legislative history of the Compensation Act. The Admiralty Extension Act contains no reference to the Compensation Act, and five days after enactment of the Admiralty Extension Act the Compensation Act was amended to increase the benefits payable, but neither in that amendment nor in any of its legislative history is there any reference to the Admiralty Extension Act. Bearing in mind the initial deliberate choice of the Congress to substitute the words 'upon the navigable waters' as the definition of the covered injuries for the words 'within the admiralty jurisdiction,' as was first proposed in 1927 when the Compensation Act was enacted, a holding that the Admiralty Extension Act enlarged the scope of the Compensation Act appears a judicial ukase without legislative support." (References to footnotes are omitted.)

The Admiralty Extension Act cannot under any circumstances be considered an express amendment of the Longshoremen's Act as the Longshoremen's Act is not mentioned anywhere in the Extension Act. Moreover, a contemporaneous amendment of the Longshoremen's Act made no cross-reference to the Extension Act. The Extension Act was enacted on June 19, 1948, and on June 24, 1948, a bill to increase certain benefits under the Longshoremen's Act was enacted by the Congress (Public Law No. 757 [62 Stat. 602]). Had there been any intention on the part of the Congress to amend the Longshoremen's Act in any way, surely it would have been stated at some point in the legislative history.

In House Report No. 2287, 85th Cong., 2d Sess. (July 28, 1958), submitted ten years after the passage of the Ad-

miralty Extension Act, the Congressional understanding that injuries upon piers are not covered by the Longshoremen's Act is apparent:

"The Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424; 33 U.S.C. 901 et seq.), provides compensation for injuries suffered by longshoremen, ship repairmen, ship service men and workers in related employment when they are working for private employers within the Federal maritime jurisdiction *on the navigable waters of the United States, including dry docks. These employees are subject to the protection of State safety standards when performing work on docks and in other shore areas.*" (Emphasis supplied.)

See Appendix, pp. 23, 24.

The express language of the Admiralty Extension Act is peculiarly inapplicable to a bill alleged to extend coverage under a workmen's compensation act. In relying upon the first paragraph of the Admiralty Extension Act the longshoremen below completely ignored the second, and in many respects more illuminating, paragraph. References therein to property damage and to suits *in rem* or *in personam* have no application to workmen's compensation proceedings, which are administrative in nature, and show that Congress had no intention of amending the jurisdiction requirement of the Longshoremen's Act. The Admiralty Extension Act was intended for the sole purpose of curing inequities arising when a vessel caused damage or injury on land by creating a new right to institute a suit in admiralty. See House Report No. 1523, 80th Cong., 2d Sess. (1948), 1948 U.S.C. Cong. Serv., Vol. II, pp. 1899-1900 and Appendix, pp. 27, 28.

Of the myriad of cases cited by the respondent longshoremen below and which will no doubt be cited in the brief subsequently to be filed in these proceedings in support of

their contention that the Admiralty Extension Act broadened the coverage of the Longshoremen's Act, most should be dismissed from consideration because they are not in point. The host of decisions concerning suits in admiralty for unseaworthiness by injured longshoremen are clearly distinguishable; the cause of action in unseaworthiness arises under the general maritime law, not under a limiting statute such as the Admiralty Extension Act. One case repeatedly and erroneously cited as supporting the contentions of the longshoremen's position calls for comment.

*Calbeck v. Travelers Insurance Co.*, 370 U.S. 114 (1962), dealt with the question whether a court-made distinction that state compensation acts could constitutionally be applied to employees engaged in the completion of a launched vessel under construction on navigable waters, but not to employees engaged in repair work on completed vessels on navigable waters, was still valid after passage of the Longshoremen's Act so that men engaged in construction work injured on navigable waters were excluded from coverage under the Federal statute. In holding that the Longshoremen's Act applied, the Supreme Court in no way suggested that the phrase "navigable waters" in Section 903(a) did not mean exactly that. The injury in that case occurred on navigable waters. The Court recognized the Congressional intent when the Longshoremen's Act was passed to fill the *Jensen — Knickerbocker — Dawson* gap by providing compensation for injuries which had been judicially insulated from State coverage — on navigable waters. Several excerpts from the opinion support this conclusion:

"There emerges from the complete legislative history a congressional desire for a statute which would provide federal compensation for all injuries to employees on navigable waters; in every case, that is, where *Jensen* might have seemed to preclude state compensation. . . ." 370 U.S. at page 120.

"In sum, it appears that the Longshoremen's Act was designed to ensure that a compensation remedy existed for all injuries sustained by employees on navigable waters, and to avoid uncertainty as to the source, state or federal, of that remedy. . . ." 370 U.S. at page 124.

"We conclude that Congress used the phrase 'if recovery . . . may not validly be provided by State law' in a sense consistent with the delineation of coverage as reaching injuries occurring on navigable waters. By that language Congress reiterated that the Act reached all those cases of injury to employees on navigable waters as to which Jensen, Knickerbocker and Dawson had rendered questionable the availability of a state compensation remedy." 370 U.S. at page 126.

There is nothing questionable about the availability to the longshoremen of a state compensation remedy.

The majority below has cited three cases which it feels read the *Calbeck* case as one which enlarges coverage under the Longshoremen's Act. Those cases are *Interlake S.S. Co. v. Nielsen*, 338 F. 2d 879, 882-883 (6th Cir. 1964); *Spann v. Lauritzen*, 344 F. 2d 204 (3rd Cir. 1965); and *Puget Sound Bridge & Dry Dock Co. v. O'Leary*, 260 F. Supp. 250 (W.D. Wash. 1966) (A. 52). It is submitted that the cases do not stand for the proposition for which they were cited by the court below.

*Interlake S.S. Co. v. Nielsen*, *supra*, involved a ship custodian who, in the course of his employment, drove his car off the end of the dock into Lake Erie, which was frozen, resulting in his death from a skull fracture. From an award of compensation under the Longshoremen's Act the vessel owner appealed on the sole ground that the fatal injury did not occur upon "navigable waters". In an opinion which made it abundantly clear that the situs of the accident was controlling, Judge Edwards, speaking for the court, concluded that there was no doubt the fatal injury did occur

upon navigable waters. He went on to find that there was also admiralty jurisdiction as the fatal injury occurred on navigable waters, the lake itself. There is no dispute that there can be coverage under the Longshoremen's Act where admiralty jurisdiction extends; but it is one thing to say that there *may* be Longshoremen's Act coverage where admiralty jurisdiction exists (for example on a vessel) and quite another thing to say that *whenever* there is admiralty jurisdiction there is coverage under that Act. All Judge Edwards stated was that there was admiralty jurisdiction, which is undisputed, and there was, in addition, coverage under the Act. That is all that was stated in *Calbeck*. Nowhere is there any suggestion in the decision that Longshoremen's Act coverage extends to a pier injury — quite the contrary, in fact. At page 882 of 338 F. 2d, Judge Edwards said:

“While the Admiralty Extension Act of 1948 obviously was not designed directly to affect the Longshoremen's and Harbor Workers' Compensation Act, it did serve to make clear that admiralty jurisdiction could extend to damage caused on land by maritime events, although early case law had held to the contrary” (Citing cases).

*Spann v. Lauritzen, supra*, is likewise not in point. Spann, a longshoreman, was injured on the pier while engaged in unloading the vessel. The sole question involved was whether Spann had a right to sue the vessel for unseaworthiness and the case held that a longshoreman engaged in the traditional seaman's work of loading and unloading a vessel has a right of recovery for unseaworthiness even though his injury occurs on a pier. The case concerns itself only with expanding admiralty jurisdiction and not at all with the extent of the coverage of the Longshoremen's Act.

*Puget Sound Bridge & Dry Dock Company v. O'Leary, supra*, arose from the drowning of a workman when the shore crane in which he was working tipped over and fell into the water alongside the pier on which it was located. The Court found that there was coverage under the Longshoremen's Act because the injury and death by drowning occurred on navigable waters. Just as in *Interlake* above, the question was whether or not there should be Longshoremen's Act coverage when the injury occurred by falling into the water alongside a pier. The Court concerned itself solely with the situs of the injury which was in navigable waters. The case did not involve a pier injury which is the case before this Court.

The position taken by the majority below that the Longshoremen's Act is status oriented is totally inconsistent with its position that the Extension Act expands the coverage of the Longshoremen's Act. The Extension Act grants admiralty tort jurisdiction in those cases in which a vessel brings about damage to person or property "notwithstanding that such damage or injury be done or consummated on land". (Emphasis supplied.) How, in view of the quoted language, can there be any doubt that the Extension Act is anything but situs oriented? When the answer is unquestionably in the affirmative, how, then, can it seriously be contended that the Extension Act expands the coverage of the Longshoremen's Act?

The longshoremen and their counsel insist that the Longshoremen's Act should be construed to provide compensation for injuries occurring on a pier. If reasons of policy dictate that pier injuries should be covered by the Longshoremen's Act as well as those occurring on navigable waters, it is for Congress, not the courts, to effect the change by appropriate legislation. Congress has not done so and as this Court said in *Pillsbury v. United Engineering Co.*,



342 U.S. 197 (1952), in reference to the Longshoremen's Act:

"We are aware that this is a humanitarian Act, and that it should be construed liberally to effectuate its purposes; but that does not give us the power to rewrite the statute of limitations at will, and make what was intended to be a limitation no limitation at all. . . . While it might be desirable for the statute to provide as petitioners contend, the power to change the statute is with Congress, not us." 342 U.S. at 200.

In his opinion in the case at bar, Judge Watkins said (A. 24, 25):

"... What claimants then in effect are asking this court to do, advancing arguments almost identical to those urged in 1927 upon Congress (and rejected by it) to the effect that the Longshoremen's Act 'should cover the contract, cover the job and not simply the man when he is on the ship', is to hold that the Extension Act sub silentio by implication repealed in 1948 the coverage provisions of the Longshoremen's Act, twenty-one years after its original enactment, and re-enacted the coverage provisions with amendments so as to extend coverage to certain shoreside injuries not previously embraced within the Longshoremen's Act. To so hold would be but the grossest type of judicial legislation, an activity in which this court is not authorized to, and in any event declines to, engage."

Even if the Court should find that the Extension Act does enlarge the coverage of the Longshoremen's Act to include pier injuries, there would still be many longshoremen, injured on the pier, who were not covered by the Longshoremen's Act as their injuries might not be caused by a vessel on navigable waters as required by the Extension Act. For example, a longshoreman could trip and fall on a pier while gathering his working tools together awaiting the arrival of a ship expected momentarily. Such an

injury is obviously not caused by a vessel on navigable waters and the injured longshoreman would clearly be limited to compensation under the state law. (See Judge Watkins' footnote on the same point at A. 21.)

#### IV.

#### ANY EXTENSION OF LONGSHOREMEN'S ACT COVERAGE TO PIER INJURIES WOULD CREATE NEW TWILIGHT ZONES AND NECESSITATE ENDLESS LITIGATION.

It is undisputed that until the decision of the Court of Appeals for the Fourth Circuit below no case ever held that pier injuries were covered by the Longshoremen's Act. Since the passage of that Act in 1927 court after court has dealt with the area known as the "twilight zone".<sup>2</sup> The twilight zone is the area between the vessel and the pier, which in past years has required considerable litigation to determine just which locations were covered by the Federal Act and which were left to state compensation acts. Injuries occurring on gangways, brows, various means of ingress and egress to vessels from docks, skids and the like as well as those occurring in falls between the vessel and the dock have all been covered by extensive litigation. Now, some 41 years after the passage of the Act, judicial interpretation has drawn the twilight zone line as finely as it can be drawn. After years of litigation, there remains very little doubt in the minds of anyone which injuries are covered by the Federal Act and which by state compensation acts.

If pier injuries such as those sustained by Johnson, Klosek and Avery should suddenly be covered by the Federal Act, a multiplicity of new suits will ensue and the

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<sup>2</sup> See reference to "twilight zone" in *Travelers Insurance Co. v. Shea*, 382 F. 2d 344 at 346.

carefully drawn line which now circumscribes the twilight zone will be totally erased.

The majority below has referred to harsh and incongruous results when, for example, longshoremen in the same gang, one of whom may be working upon the vessel and another upon the pier, are injured by the same instrumentality. Judge Haynsworth, in his dissent (A. 64), discusses even greater incongruities if the majority opinion were adopted. For example, the majority has concluded that merely because there is some space beneath a pier, which may be upon pilings, for a rowboat, canoe or the like to worm its way, the waters are thus "navigable in fact" so that the injury actually did occur "upon the navigable waters of the United States." In addition to flying in the teeth of the now settled doctrine that a pier is an extension of the land the majority ignored the perfectly obvious fact that was covered and referred to in *Michigan Mutual Liability Co. v. Arrien*, 344 F. 2d 640 (2nd Cir. 1965), *cert. den.*, 382 U.S. 835 (1965), wherein the court stated at page 644:

"A wharf or pier is usually built on pilings over what *was* navigable water. When the structure is completed, the water over which it is built is *permanently* removed from navigation as if the structure had been in the first instance built on land." (Emphasis in decision.)

On the identical point, assuming the decision of the majority below were followed, and based upon the observation that since water flowed beneath the pier the injury thus occurred upon navigable waters, imagine the confusion and ensuing litigation in those cases involving injuries to longshoremen working on a quay or wharf at the harbor's edge and beneath which no waters flow. As suggested by Judge Haynsworth, would a longshoreman be covered by the Act if he were working on that portion of a pier which is on the seaward side of high water but not covered if he

were on the shore side of the high water? Suppose the status theory were adopted. Would a longshoreman be covered wherever he was injured, several miles from the water, if he were on an errand to pick up supplies, even though under the Admiralty Extension Act he could not under any circumstances be entitled to admiralty tort jurisdiction as his injury was not caused by a vessel? Would a longshoreman be covered if his injuries were caused by a shore based crane engaged in loading the ship but not covered if he was struck by a switch engine moving empty freight cars? Not suggested by Judge Haynsworth but nevertheless a question which would involve considerable litigation arises — what would happen to a longshoreman injured on his way from one job to another while crossing a bridge, each end of which touched the land and the pilings of which were firmly embedded in the river bed? Is there any difference between the bridge and the pier except that it touches land at two ends rather than one? Is there any logical reason which suggests a bridge is not properly considered to be land just as piers have uniformly been so considered? The majority below, if consistent, would suggest otherwise.

The majority below cites a number of cases, just as have the longshoremen in prior proceedings, showing that the courts have held the language "upon navigable waters" has been used to give admiralty jurisdiction in instances which might appear questionable. For example, the court cites *D'Aleman v. Pan American World Airways*, 259 F. 2d 493 (2nd Cir. 1956) (A. 54) for injuries sustained by persons flying over the water. The reference however is inapposite as it has no connection whatever with the point here involved — the payment of compensation under the Longshoremen's Act.

Equally misplaced is the apparent support of the longshoremen's arguments by the court below in citing the Fifth Circuit case of *L'Hote v. Crowell*, 54 F. 2d 212 (1931), *rev'd on other grounds*, 286 U.S. 528 (1931), for the proposition that the injury to Klosek, who was knocked from the gondola car to the pier by the draft which struck him, was an injury occurring upon the "navigable waters", the point being that the injured man in *L'Hote*, like Klosek, when first lifted from the pier before the injury takes place, is in a different category from someone injured directly on the pier (A. 54).

The principle involved in *L'Hote* was covered by the Supreme Court in *The Admiral Peoples*, 295 U.S. 649 (1935). A passenger disembarking from a ship over its gangplank which projected above the dock fell from the shore end of the gangplank to the dock and was injured. The Court held that the gangplank was part of the vessel and the cause of action therefore arose while the injured party was still on the vessel although the actual physical injury was sustained on the dock. The Court cited the *L'Hote* case with approval. In *L'Hote*, a longshoreman, while riding a vessel's cargo sling from the wharf to the deck of the vessel suffered injuries when the sling struck the side of the vessel and precipitated him to the wharf. It was stated there at page 213 of 54 F. 2d that the longshoreman had "finished his work on the wharf and from the time he was lifted from it by the sling by means of the ship's tackle was under the control of an instrumentality of the ship." The facts in *L'Hote* and *The Admiral Peoples* are entirely different from the facts as related to Klosek who at no time was on the vessel, or any part of it, but was in a gondola car on the pier itself when he was struck by the draft. The initial impact in the *L'Hote* case occurred on the vessel. The impact in the Klosek case, as well as Johnson and Avery, clearly occurred on the pier.

### CONCLUSION

For the reasons advanced:

1. Piers are extensions of the land; injuries occurring on them are not covered by the Longshoremen's Act as such injuries were not sustained upon navigable waters;
2. The Longshoremen's Act is situs, not status, oriented;
3. The legislative history of the Longshoremen's Act makes it clear that pier injuries were intentionally excluded from its coverage;
4. The Admiralty Extension Act of 1948 did not enlarge the coverage of the Longshoremen's Act;
5. The twilight zone should not be enlarged by extending the coverage of the Longshoremen's Act to the land;

the decision of the Court of Appeals for the Fourth Circuit should be reversed and that of the District Courts for the District of Maryland and the Eastern District of Virginia should be reinstated.

Respectfully submitted,

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January 23, 1969

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# In the Supreme Court of the United States

OCTOBER TERM, 1968

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No. 528

NACIREMA OPERATING Co., INC. AND LIBERTY MUTUAL  
INSURANCE COMPANY, PETITIONERS

v.

WILLIAM H. JOHNSON, JULIA T. KLOSEK AND ALBERT  
AVERY

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No. 663

JOHN P. TRAYNOR AND JERRY C. OOSTING, DEPUTY  
COMMISSIONERS, PETITIONERS

v.

WILLIAM H. JOHNSON, JULIA T. KLOSEK AND ALBERT  
AVERY

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FOURTH CIRCUIT

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BRIEF FOR TRAYNOR AND OOSTING,  
DEPUTY COMMISSIONERS

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## OPINIONS BELOW

The opinion of the court of appeals (App. 42-65),  
sitting *en banc*, is reported at 398 F. 2d 900. The opin-  
ion of the district court in *Johnson and Klosek*

(App. 11-34) is reported at 243 F. Supp. 184. The district court opinion in *Avery* (App. 35-41) and the various opinions of the deputy commissioners (App. 2-11) are not reported.

#### JURISDICTION

The judgments of the court of appeals (App. 65-68) were entered on June 20, 1968. The petition for a writ of certiorari in No. 528 was filed on September 16, 1968. On September 9, 1968, Mr. Justice Black extended the time for filing a petition in No. 663 to and including October 18, 1968. That petition was filed on October 17, 1968, and both petitions were granted on December 9, 1968. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

#### QUESTION PRESENTED

Whether longshoremen who are injured on piers while loading a ship's cargo are entitled to compensation under Section 3(a) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 903(a).

#### STATUTES INVOLVED

The Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 901 *et seq.*, provides in pertinent part:

§ 902 [Section 2 of the Act]. *Definitions.*

When used in this chapter—

\* \* \* \* \*

(2) The term "injury" means accidental injury or death arising out of and in the course of employment \* \* \*.

\* \* \* \* \*

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock).

\* \* \* \* \*

§ 903 [Section 3 of the Act]. *Coverage.*

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

§ 920 [Section 20 of the Act]. *Presumptions.*

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter.

\* \* \* \* \*

The Admiralty Extension Act of 1948, 46 U.S.C. 740, provides in pertinent part:

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

\* \* \* \* \*

#### STATEMENT

These cases involve claims for compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901, *et seq.* (hereafter sometimes referred to as the "Longshoremen's Act"). The relevant facts, which are not in dispute, are as follows:

1. *The Johnson and Klosek Cases*.—William H. Johnson and Joseph J. Klosek were employed by the Nacirema Operating Company as longshoremen; they were generally engaged in loading and unloading cargo as part of a "gang" of approximately twenty men assigned to a particular vessel by their employer (App. 3, 5, 45). In practice, the entire gang reported to the vessel and two to four men were then ordered back onto the pier to work as "slingers" or "hook-on men" during the loading operation.

The work on the pier is essentially the same as that on board the vessel, and it is not uncommon for the men to rotate positions and pass back and forth between the ship and the pier during a given loading operation (App. 45). Since Nacirema thus had employees engaged in maritime employment upon navigable waters, it was an employer under the Longshoremen's Act, 33 U.S.C. 902(4). Its liability under that Act was insured by The Travelers Insurance Company (App. 3, 5-6).

On November 14, 1963, Johnson and Klosek were stationed in a gondola-type railroad car several hundred feet from shore on the Bethlehem Steel High Pier at Sparrows Point, Maryland. The pier extends six hundred feet into the Patapsco River, in a southerly direction (App. 3, 6). The vessel SS "Bethex" was moored on the east side of the pier, and a crane on that vessel was in the process of hoisting ten-ton drafts of steel beams from the railroad car onto the ship. Johnson and Klosek were engaged in hooking the drafts onto the crane (App. 3, 6).

As a draft was being lifted out of the car, it began to rotate. One end lifted Klosek from the car and dropped him head first onto the pier, causing fatal injuries. The other end crushed Johnson against the side of the car, causing him disabling injuries (App. 3, 6, 44). The deputy commissioner denied both claims for compensation on the ground that neither injury occurred "upon the navigable waters of the United

States" (App. 4, 7), and the district court upheld the decisions (App. 11-34).<sup>1</sup>

2. *The Avery Case*.—Albert Avery was employed by the Old Dominion Stevedoring Corporation. Like Johnson and Klosek, he was working as a hook-on man at the time of his injury, on December 28, 1961 (App. 10, 45). He was assigned to an open railroad car containing logs which were being hoisted by ship's gear onto a vessel afloat on the Elizabeth River at Norfolk, Virginia. The car was on a city pier, which jutted out from the shore over the waters of the river (App. 10).

Avery was crushed against the side of the car by a swinging draft of logs. The deputy commissioner denied his claim for compensation on the ground that he was not injured "upon the navigable waters of the United States" within the meaning of Section 3(a) of the Act (App. 10, 11). This decision was also affirmed by the district court (App. 35-41).

Avery was awarded compensation under the Virginia Workmen's Compensation Law. On the basis of his average weekly wage of \$68.07, he was awarded benefits of \$32.40 per week from December 28, 1961, to July 12, 1962 (App. 11). Under the Longshoremen's Act, he would have received two-thirds of his wage, or \$45.38 per week. 33 U.S.C. 908(b). Further-

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<sup>1</sup> Both Johnson and Klosek's widow and minor children have filed claims, and are concededly entitled to benefits, under the Maryland Workmen's Compensation Act (App. 13-14). Since the employer receives a credit under the federal Act for payments made under the State Act (see 33 U.S.C. 914(k)), the present suits presumably were brought because greater benefits are available in this case under the federal Act.

more, these benefits might have been available for a considerably longer period of time, since the Virginia law contains limitations not found in the federal Act. Compare 9 Va. Code § 65-51 (1950) (now § 65.1-54) with 33 U.S.C. 908(b).

3. *The Court of Appeals Decision.*—The court of appeals, sitting *en banc*, reversed each of the district court decisions.<sup>2</sup> It held that the legislative history of the Longshoremen's Act supported the view that the Act was intended to be "status oriented," thus covering all injuries sustained by longshoremen in the course of their maritime employment (App. 48). Moreover, the court viewed as binding this Court's statement in *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114, 130, that "Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject-matter. \* \* \* It is sufficient to say that Congress intended the compensation act to have a coverage co-extensive with the limits of its authority" (App. 50). The court further noted that federal maritime tort jurisdiction had been expanded by the Admiralty Extension Act of 1948, 46 U.S.C. 740, and held that the Longshoremen's Act could be read to embody this expanded concept of jurisdiction rather than being limited to that which existed when the Act was passed in 1927 (App. 51-52). In addition, the court held that the statutory standard that the injury occur upon the navigable waters of the United States was

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<sup>2</sup> The cases were consolidated below. A fourth case, No. 10060, involved a longshoreman who had drowned after being knocked off a pier into the water. There the deputy commissioner awarded compensation, and the district court and court of appeals affirmed. Certiorari was not sought in that case.



satisfied because small vessels, such as row boats and canoes, are in fact able to navigate beneath the piers on which the injuries occurred (App. 55-56).

The dissenting judges believed that the edge of the pier was intended by Congress to be the dividing line between federal and State coverage (App. 61), and that the Admiralty Extension Act could not be considered to have modified the Longshoremen's Act without an express congressional statement to that effect (App. 62-63).

#### SUMMARY OF ARGUMENT

With sound basis in the language and legislative history of the Longshoremen's Act, this Court has repeatedly held that the Act adopted the line of demarcation between State and federal authority that was established in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, and related cases. The *Jensen* line of cases was based on a territorial constitutional interpretation that placed injuries to longshoremen occurring on land and extensions of land (including piers) exclusively within the regulatory jurisdiction of the States—beyond the reach of the federal maritime jurisdiction. Accordingly, the consistent administrative and appellate judicial interpretation, except for the decision below, has been that the Act does not apply to injuries occurring on piers or other extensions of land—that these are not injuries “occurring upon the navigable waters of the United States (including any dry dock)” within the meaning of 33 U.S.C. 903(a). Indeed, in *Swanson v. Marra Bros., Inc.*, 328 U.S. 1, this Court said without dissent that the Longshoremen's Act is not applicable to pierside injuries. We find no reason to doubt either

the correctness or the continuing authority of that interpretation as a matter of statutory construction.

This Court has held that the Longshoremen's Act established its own standard of coverage, reflecting the *Jensen* line of decisions, and that the Act's coverage does not expand or contract with changing views about the scope of federal maritime jurisdiction. It follows that the coverage of the Longshoremen's Act was not affected by the mere articulation by Congress in the Admiralty Extension Act of 1948 of a more expanded concept of admiralty jurisdiction than was reflected in the *Jensen* line of cases. Nothing in the language of the Admiralty Extension Act, its legislative history or the subsequent legislative history of the Longshoremen's Act suggests that the latter Act's coverage would in any way be affected by the Extension Act.

Pierside injuries do not occur in a "twilight zone" in which it is doubtful whether State or federal law is applicable. It has always been clear that such injuries are on the State side of "the *Jensen* line of demarcation" adopted in the Longshoremen's Act and are, therefore, compensable only under State compensation statutes. The principle of the "twilight zone," which was adopted by this Court to eliminate uncertainties in this field, should not be converted into an instrument for injecting new uncertainties that would necessitate extensive further litigation. It is for Congress to decide whether, and to what extent, the federal compensation law should be extended beyond the federal side of "the *Jensen* line of demarcation."

## ARGUMENT

The government is aware of the policy considerations reflected in the decision of the court of appeals in these cases. As that court's opinion demonstrates, there is much to be said for the proposition that a uniform system of compensation should be available for all injuries suffered by longshoremen in the course of their employment, in lieu of a system whereby different scales of compensation apply, under State or federal law, depending on the situs of the injury. As a matter of legislative policy, Congress might well conclude to expand the Longshoremen's Act to cover pierside injuries, such as are involved in these cases, and there would today be a substantial basis on which the constitutional validity of such a statute could be sustained. However, after careful reconsideration of the question in light of the decision below, we adhere to the view, accepted by the dissenting opinion below, that broad policy considerations are not appropriate in this case, that it remains one of sound statutory construction, and that the Longshoremen's Act was not intended by Congress to be applied to pierside injuries. On the contrary, Congress understood that State law would continue to provide for compensation for such injuries—as it did in these cases.

- I. THIS COURT'S SETTLED INTERPRETATION OF THE LONGSHOREMEN'S ACT, AS WELL AS THE ACT'S LANGUAGE, LEGISLATIVE HISTORY AND CONSISTENT ADMINISTRATIVE INTERPRETATION, INDICATE THAT THE ACT DOES NOT APPLY TO PIERSIDE INJURIES

The legislative history of the Longshoremen's Act was extensively reviewed in this Court's opinion in

*Calbeck v. Travelers Insurance Co.*, 370 U.S. 114, and in the government's brief in that case. The Court there noted that the Longshoremen's Act was enacted in response to the decision in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, which held that State workmen's compensation laws could not constitutionally be applied to injuries that are exclusively within the federal maritime jurisdiction, and the subsequent decisions in *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, and *Washington v. Dawson & Co.*, 264 U.S. 219, which struck down congressional attempts to permit State compensation laws to apply in the *Jensen* area. After reviewing the Act's legislative history, this Court in *Calbeck* reiterated the conclusion earlier expressed in *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244, 249, that " \* \* \* the purpose of the Act was to provide for federal compensation in the area which the specific decisions referred to [in the Senate Report—*Jensen*, *Knickerbocker*, and *Dawson*—] placed beyond the reach of the states. \* \* \* " 370 U.S. at 128. The *Calbeck* opinion also reiterated the view previously expressed in *Davis v. Department of Labor*, 317 U.S. 249, 256, that " \* \* \* the Act adopts 'the *Jensen* line of demarcation' \* \* \* between admiralty and state jurisdiction as the limit of federal coverage \* \* \* " 370 U.S. at 128.

We believe that "the *Jensen* line of demarcation," to which this Court there referred, is the line between injuries "occurring upon the navigable waters of the United States (including any dry dock)" (Sec. 3 (a), *supra*) and injuries occurring on land or extensions of land (including piers). The latter area was

delimited, prior to the enactment of the Longshoremen's Act, in *Industrial Commission v. Nordenholt Corp.*, 259 U.S. 263, as an area in which injuries were governed by State, rather than federal, law. As was explained in the government's brief in *Calbeck* (Pet. Br., No. 532, October Term, 1961, p. 27), *Nordenholt* differed significantly from such decisions as *Western Fuel Co. v. Garcia*, 257 U.S. 233, and *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469, in which the Court had permitted the application of State compensation laws to injuries occurring on the federal side of "the *Jensen* line of demarcation" but which, though maritime, were "local in character" and a proper matter of "local concern." In *Nordenholt*, as we said in our *Calbeck* brief (Pet. Br., No. 532, October Term, 1961, pp. 28-29):

\* \* \* the Court held that a state workmen's compensation act could validly be applied to an injury to a stevedore engaged in unloading the cargo of a vessel, since the injury had occurred on a dock which was "an extension of the land." *Industrial Commission v. Nordenholt Corp.*, 259 U.S. 263, 275. The activity, employment, and maritime nature of the contract were virtually identical to those in *Jensen*. The locus of the injury was the distinguishing feature: the injury occurred on the dock, rather than on the ship. Unlike *Garcia* and *Rhode*, the decision did not rest upon the newly evolved "local concern" doctrine but was based upon the then prevailing view of the line of demarcation between admiralty and local law which placed injuries occurring upon a dock (which was upon navigable waters) beyond admiralty jurisdiction and within the exclusive jurisdiction of state law. *Cleveland Ter-*

*minal Valley R.R. Co. v. Cleveland S.S. Co.*, 208 U.S. 316. But see Act of June 19, 1948, 62 Stat. 496, 46 U.S.C. 740. Since maritime law did not apply, there was no conflict between it and local law, and the latter governed. 259 U.S. at 275-276.

It was against this background that the Court in *Calbeck* interpreted the language in Section 3(a) and its legislative history, including the explicit statement in the Senate Report that " \* \* \* injuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf<sup>3</sup> and the ship so as to bring them within the maritime jurisdiction of the United States." S. Rep. No. 973, 69th Cong., 1st Sess., p. 16, quoted at 370 U.S. 121 n. 10. Accordingly, the Court's holding in *Calbeck* that the Act adopts "the *Jensen* line of demarcation," and indeed the interpretation of the Act reflected in the entire *Calbeck* opinion, seems in every way consistent with the following summary of the Act's legislative history which was contained in the government's brief in *Calbeck* and which has special relevance to the present cases (Pet. Br., No. 532, October Term, 1961, pp. 43-44):

In short, the legislative history reveals the intent of Congress to provide coverage under

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<sup>3</sup> In precise usage, a "wharf" differs from a "pier," in that a wharf is a structure built on the shore while a pier extends out from the shore over the water. In the context of the remainder of the sentence quoted, however, it appears that the word "wharf" was here used in a more generic sense as synonymous with land or extensions of land (including piers) so as to reflect "the *Jensen* line of demarcation" as elaborated in *Nordenholt*.

the Longshoremen's Act for all injuries to employees within the maritime jurisdiction of the United States (including those within the "local concern" doctrine) and to exclude from coverage only those injuries in maritime employment on land or extensions of land where state workmen's compensation applies "by State law" in and of itself.

Although it may appear a little strange today that Congress sought to exclude from the Act's coverage injuries in maritime employment occurring upon extensions of land, the exclusion is easily understandable in light of the problems confronting the draftsmen at the time. The exclusion of such injuries from the maritime jurisdiction of the United States had been settled by authoritative decisions of this Court. *Industrial Commission v. Nordenholt Corp.*, 259 U.S. 263 \* \* \*; *Cleveland Terminal Valley R.R. Co. v. Cleveland S.S. Co.*, 208 U.S. 316. As the House report explained, the Longshoremen's Act was designed to enable "Congress to discharge its obligation to the maritime workers placed under their jurisdiction by the Constitution." H. Rept. No. 1767, 69th Cong., 2d Sess., p. 20. The Senate report also explained that the Act was limited to injuries "within the maritime jurisdiction of the United States." S. Rept. No. 973, 69th Cong., 1st Sess., p. 16. Thus, in determining the coverage of the Act, Congress accepted the then recognized line of demarcation between federal maritime and state au-

thority.<sup>11)</sup> The invalidation by this Court of two prior statutes enacted by Congress to permit state workmen's compensation for workers injured within the maritime jurisdiction made the draftsmen careful to avoid any possible constitutional pitfalls.

11) Section 3(a) did provide that injuries occurring on dry docks and marine railways were within the coverage of the Act. See *Avondale Marine Ways v. Henderson*, 346 U.S. 366, affirming 201 F. 2d 437 (C.A. 5) \* \* \*. Dry docks, however, float on water, and marine railways are apparently regarded merely as extensions of dry docks.

The view that *Nordenholt* reflected a constitutional limitation on the federal maritime jurisdiction (adopted in the Act) persisted for a number of years after the enactment of the Longshoremen's Act. In *Crowell v. Benson*, 285 U.S. 22, 55, the Court cited *Nordenholt* for the proposition that "\* \* \* the locality of the injury, that is, whether it has occurred upon the navigable waters of the United States, determines the existence of the congressional power to create the liability prescribed by the statute." See, also, *Minnie v. Port Huron Terminal Co.*, 295 U.S. 647, 648; *T. Smith & Son, Inc. v. Taylor*, 276 U.S. 179. Though this constitutional interpretation may not seem conclusive today, it cannot be doubted that it was the prevailing interpretation when the Longshoremen's Act was enacted, and was the basis for the Act's coverage provision in Section 3(a), *supra*.



These considerations have led this Court to state without dissent that the Longshoremen's Act does not apply to pierside injuries. *Swanson v. Marra Brothers, Inc.*, 328 U.S. 1. That case was a Jones Act suit by a longshoreman who was injured "while on a pier and engaged in loading cargo on a vessel \* \* \*." 328 U.S. at 2. Both the Court and the parties assumed that such an injury is one occurring "on shore" for purposes of interpreting the relationship between the Jones Act and the Longshoremen's Act as that relationship bore on the longshoreman's claim. In holding that he had no right of recovery under the Jones Act, the Court said (328 U.S. at 7):

We must take it that the effect of these provisions of the Longshoremen's Act is to confine the benefits of the Jones Act to the members of the crew of a vessel plying in navigable waters and to substitute for the right of recovery recognized by the *Haverty* case only such rights to compensation as are given by the Longshoremen's Act. But since this Act is restricted to compensation for injuries occurring on navigable waters, it excludes from its own terms and from the Jones Act any remedies against the employer for injuries inflicted on shore. The Act leaves the injured employees in such cases to pursue the remedies afforded by the local law, which this Court has often held permits recovery against the employer for injuries inflicted by land torts on his employees who are not members of the crew of a vessel. *State Industrial Commission v. Nordenholt Corp.*, *supra*; *Smith & Son v. Taylor*, *supra*; cf. *Minnie v. Port Huron Co.*, *supra*.

We find no reason to doubt either the correctness or the continuing authority of this interpretation of the Longshoremen's Act as being inapplicable to pier-side injuries. In the year following the statute's enactment, this Court, on the authority of *Nordenholdt*, reaffirmed the applicability of State compensation laws to such injuries. *T. Smith & Son, Inc. v. Taylor*, *supra*. Moreover, from the outset, the Employee's Compensation Commission, which administered the federal Act, declared it inapplicable to pierside and other on-shore injuries (see the Commission's Opinions Nos. 5, 16 and 30 (1927 A.M.C. 1558, 1855; 1928 A.M.C. 417)), and the successor agencies administering the statute have consistently adhered to that view during the entire ensuing period down to and including the present cases. With the exception of the decision below, the courts of appeals which have considered the question have also adhered to this settled interpretation of the Longshoremen's Act. *Nicholson v. Calbeck*, 385 F. 2d 221 (C.A. 5), certiorari denied, 389 U.S. 1051; *Travelers Ins. Co. v. Shea*, 382 F. 2d 344 (C.A. 5), certiorari denied *sub nom. McCollough v. Travelers Ins. Co.*, 389 U.S. 1050; *Houser v. O'Leary*, 383 F. 2d 730 (C.A. 9), certiorari denied, 390 U.S. 954.<sup>4</sup>

Whether the statute should have its reach extended beyond that prescribed by Congress is a legislative matter. It is not for the courts to rewrite the statute, as the majority of the court below has done. In its

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<sup>4</sup>On October 14, 1968, this Court denied a consolidated motion for leave to file a petition for rehearing in these three cases (393 U.S. 903).

decisions interpreting the Longshoremen's Act, this Court has demonstrated that the judicial task is, instead, to work within the dual system of compensation which Congress established, in response to the *Jensen* decision, and to achieve a maximum degree of stability and certainty within that system.<sup>5</sup>

## II. THE ADMIRALTY EXTENSION ACT OF 1948 DID NOT EXPAND THE COVERAGE OF THE LONGSHOREMEN'S ACT TO INCLUDE PIERSIDE INJURIES

This Court has long since held that an interpretation which would enlarge or contract the coverage of the Longshoremen's Act "in accordance with whether this Court rejected or reaffirmed the constitutional basis of the *Jensen* and its companion cases cannot be acceptable" because the "result of such an interpretation would be to subject the scope of protection that Congress wished to provide, to uncertainties that Congress wished to avoid." *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244, 250. Instead, the Court "held that Congress has by the Longshoremen's Act accepted the *Jensen* line of demarcation between state and federal jurisdiction." *Davis v. Department of Labor*, 317 U.S. 249, 256. It seems manifest, and inescapable, to us that

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<sup>5</sup> Indeed, if a more decisive judicial contribution is to be made toward uniformity in the law in this area, it would seem more appropriate for this Court, in a proper case, to overrule the *Jensen* decision, which was of its own making. This would provide Congress with the additional option of permitting the entire matter of longshoremen's compensation to be handled by the States, thereby achieving state-by-state uniformity and eliminating such fruitless controversies as the present one. There is, of course, no occasion to reexamine *Jensen* in the present cases, which involve only a question of the application of the existing federal Act.

these principles are equally applicable to the mere articulation by Congress in the Admiralty Extension Act of 1948 (Act of June 19, 1948, 62 Stat. 496, 46 U.S.C. 740) of a more expanded scope of admiralty jurisdiction than was reflected in the *Jensen* and companion cases. As was pointed out by the dissenting judges below (App. 62-63), there was no suggestion in the language of the Admiralty Extension Act, in its legislative history, or in the subsequent legislative history of the Longshoremen's Act that the coverage of the latter Act would in any way be affected by the Admiralty Extension Act.

On the contrary, the language of the Admiralty Extension Act, read in its entirety, does not lend itself to such a result; and Congress has clearly indicated that it does not understand that the Act altered the division of federal and State responsibility in this field. This appears from H. Rep. No. 2287, 85th Cong., 2d Sess., p. 2, in which it was said, in 1958, ten years after the enactment of the Admiralty Extension Act, that longshoremen and others "are subject to the protection of State safety standards when performing work on docks and in other shore areas." Similarly, this Court in *Calbeck*, some fourteen years after the enactment of the Admiralty Extension Act, referred repeatedly and without question to "the [Longshoremen's] Act's adoption of the Jensen line between admiralty and state jurisdiction as the limit of federal coverage \* \* \*." 370 U.S. at 128, 126, 130.

### III. THE INJURIES IN THESE CASES DID NOT OCCUR IN A "TWILIGHT ZONE" IN WHICH IT WAS DOUBTFUL WHETHER STATE OR FEDERAL LAW APPLIED

The reliance by the court below on the fact that small vessels are able to navigate beneath the piers on which these injuries occurred (App. 55-56) suggests the possibility that this case could be resolved by reliance upon the Act's presumption in favor of coverage (Sec. 20(a), *supra*) because the injuries occurred in a "twilight zone" in which there is doubt as to what law is applicable. See *Davis v. Department of Labor*, 317 U.S. 249, 256; *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114, 128. We do not believe, however, that the principle of the "twilight zone" is properly applicable to pierside injuries.

In *Calbeck*, this Court decided, as we urged it to do, that the federal Act applies to all injuries to long-shoremen occurring on the federal side of "the *Jensen* line of demarcation." 370 U.S. at 128. The *Calbeck* decision had a twofold salutary effect, in that (1) it established beyond doubt that all injuries to long-shoremen would be covered by either State or federal compensation laws and (2) it eliminated virtually all theretofore existing uncertainty as to the scope of coverage of the federal Act. In this field, as this Court's opinions reflect, a high degree of certainty as to the applicable remedy is an obvious virtue—so long as no injuries will be left uncompensated. This is the situation that has been achieved under *Calbeck*. A holding that the federal Act can also be applied to an undefined category of injuries on the State side of "the *Jensen* line of demarcation," where it was

never thought that the Longshoremen's Act applied (see, e.g., *Swanson v. Marra Brothers, Inc.*, *supra*), would inject complex new uncertainties into this field that would necessitate considerable future litigation (see App. 64). If Congress were to choose to expand the coverage of the Longshoremen's Act, it could do so in a way which would minimize such uncertainties. It seems to us that the "twilight zone" concept, which was adopted by this Court to eliminate uncertainties in this field, should not be converted into an instrument for creating uncertainties.

We believe, in short, that it should be left to Congress to decide whether, and to what extent, the coverage of the Longshoremen's Act should be expanded beyond the federal side of "the *Jensen* line of demarcation." The line which Congress drew was clearly based on territorial and not on status considerations. We find no proper legal basis for accepting the judicial innovation formulated by the majority of the court below.

#### CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments of the court of appeals should be reversed.

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FEBRUARY 1969.

**FILE COPY**

**FILED**

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**IN THE**  
**Supreme Court of the United States**

**OCTOBER TERM 1968**

**No. ~~100~~ 9**

**NACIREMA OPERATING CO., INC., ET AL.,**  
*Petitioners*

**v.**

**WILLIAM H. JOHNSON, ET AL.,** *Respondents*

**No. ~~100~~ 16**

**JOHN P. TRAYNOR and JERRY C. OOSTING,**  
**DEPUTY COMMISSIONERS,**  
*Petitioners*

**v.**

**WILLIAM H. JOHNSON, ET AL.,** *Respondents*

**On Writ of Certiorari to the United States**  
**Court of Appeals for the Fourth Circuit**

**BRIEF ON BEHALF OF THE**  
**NATIONAL MARITIME COMPENSATION**  
**COMMITTEE AS AMICUS CURIAE**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM 1968

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**No. 528**

NACIREMA OPERATING CO., INC., ET AL.,  
*Petitioners*

v.

WILLIAM H. JOHNSON, ET AL., *Respondents*

---

**No. 663**

JOHN P. TRAYNOR and JERRY C. OOSTING,  
DEPUTY COMMISSIONERS,  
*Petitioners*

v.

WILLIAM H. JOHNSON, ET AL., *Respondents*

---

On Writ of Certiorari to the United States  
Court of Appeals for the Fourth Circuit

---

BRIEF ON BEHALF OF THE  
NATIONAL MARITIME COMPENSATION  
COMMITTEE AS AMICUS CURIAE

---

TO THE HONORABLE JUDGES OF SAID COURT:

**CONSENT OF PARTIES**

All of the parties in these causes have given their written consent to the filing of this Brief Amicus Curiae and such written consent has been filed with the Clerk.

## STATEMENT OF INTEREST

The National Maritime Compensation Committee is a nationwide organization whose membership is composed of representatives of the following twenty maritime associations from substantially all of the maritime centers in the United States:

American Merchant Marine Institute, Inc.  
Boston Shipping Association, Inc.  
Great Lakes Terminal Association  
Hampton Roads Maritime Association, Inc.  
Lake Carriers Association  
Master Contracting Stevedores Association of  
the Pacific Coast, Inc.  
Mobile Steamship Association, Inc.  
National Association of Stevedores  
New Orleans Steamship Association  
New York Shipping Association, Inc.  
North Atlantic Ports Association  
Pacific American Steamship Association  
Pensacola Steamship Association  
Philadelphia Marine Trade Association  
Portland Shipping Association, Inc.  
Savannah Maritime Association  
Steamship Trade Association of Baltimore, Inc.  
Tampa Steamship Association  
United States Great Lakes Shipping Association  
West Gulf Maritime Association

In turn the membership of these maritime associations include substantially all of the different types of employers whose employees come within the jurisdiction of the Longshoremen's Act.

The National Maritime Compensation Committee was formed by these employer groups as a means of making known, primarily to the Congress, the views of substantially all segments of the maritime industry in connection with legislation relating to the compensation of their employees who are injured in the course of their employment.<sup>1</sup>

While not contemplated when the National Maritime Compensation Committee was initially formed, it is a particularly appropriate organization to file this Amicus Curiae Brief in order to acquaint this Court with the views of the employers in substantially all segments of the maritime industry as a whole.<sup>2</sup>

Notwithstanding this Court's repeated holdings that jurisdiction under the Longshoremen's Act existed only when the situs of the injury was "upon the navigable waters of the United States" as the Longshoremen's Act expressly provides, and notwithstanding two decisions of the Court of Appeals for the Fifth Circuit in 1967,<sup>3</sup> one

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1. The National Maritime Compensation Committee is registered pursuant to the Federal Regulation of Lobbying Act.

2. The Court's records will reflect that a Brief Amici Curiae was filed in support of the granting of the Petition for a Writ of Certiorari by eight maritime employer associations, all of whom are members of the National Maritime Compensation Committee. Under the circumstances, it was felt that no separate brief on their behalf needed to be filed. The associations that filed the Brief Amici Curiae in support of the Petition have not, therefore, lost their interest or concern about the outcome of these cases, but are among those who are participating in the present brief as members of the National Maritime Compensation Committee.

3. *Travelers Insurance Co. v. Shea*, 5 Cir. 1967, 382 F.2d 344, cert. den. 389 U.S. 1050, 19 L.Ed.2d 842, 88 S.Ct. 780 (1968) Motion for Leave to File Late Petition for Rehearing denied, Oct. 14, 1968 and *Nicholson v. Calbeck*, 5 Cir. 1968, 385 F.2d 221, cert. den. 389 U.S. 1051, 19 L.Ed.2d 843, 88 S.Ct. 790 (1968), Motion for Leave to File Late Petition for Rehearing denied, October 14, 1968.

decision from the Court of Appeals for the Ninth Circuit in 1967,<sup>4</sup> and a decision of the Court of Appeals for the Second Circuit in 1965<sup>5</sup> all of which followed this Court's earlier decisions by expressly holding that when the situs of the injury was on the dock the jurisdiction of the Longshoremen's Act did not extend to it, the Court of Appeals for the Fourth Circuit below has held in these cases that jurisdiction under the Longshoremen's Act is not to be determined on the basis of the "situs" of the injury on navigable waters, but rather on the basis of the maritime function or status of the employee at the time of his injury without regard to its "situs" whether ashore or afloat.

In so doing it is respectfully submitted that the Court of Appeals below was clearly wrong, that its decision attempting to create an entirely new "status test" for determining jurisdiction under the Longshoremen's Act should again be rejected by this Court, and that this Court should reaffirm its prior decisions which hold that the Congressional "situs test" is to be used in determining whether jurisdiction over a particular injury falls within the Longshoremen's Act or within the purview of a state workmen's compensation act.

## SUMMARY OF ARGUMENT

### 1.

Jurisdiction under the Longshoremen's Act has always been based, as Congress expressly provided, on the "situs" of the injury, and not on the "status" or function of the

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4. *Houser v. O'Leary*, 9 Cir. 1967, 383 F.2d 730, cert. den. 390 U.S. 954, 19 L.Ed.2d 1147, 88 S.Ct. 1047 (1968), Motion for Leave to File Late Petition for Rehearing denied, October 14, 1968.

5. *Michigan Mutual Liability Co. v. Arrien*, 2 Cir. 1965, 344 F.2d 640, cert. den. 382 U.S. 835, 15 L.Ed.2d 78, 86 S.Ct. 80 (1965).

employee at the time of injury. In holding that the employee's "status" or function as a maritime worker was determinative of jurisdiction between the state and federal compensation remedies, the Court of Appeals below completely discarded this Court's unequivocal holding directly to the contrary in 1962 in the *Calbeck* case.<sup>6</sup>

## 2.

The Congressional "situs test" and not the Fourth Circuit "status test" has also always been applied to those employees who do not fall within the usual concept of "longshoremen" or "shipyard workers", but who are better described as "harbor workers" for whom the Longshoremen's & Harbor Workers' Compensation Act was also passed. First in *Nogueira* in 1929 and again in *O'Rourke* in 1953, this Court held that the "situs" of a railroad employee's injury upon navigable waters gave exclusive jurisdiction to the Longshoremen's Act to the exclusion of the Federal Employers' Liability Act covering railroad workers and whether his "status" was that of a railroad worker or a maritime employee was of no significance.<sup>7</sup>

## 3.

The constitutional line of jurisdiction between the Longshoremen's Act and the state compensation acts has been clearly defined over the last 40 years under the Congressional "situs test". It is simple and easy to apply:

1. Situs of injury upon navigable waters—Longshoremen's Act applies.
2. Situs of injury on land or extension thereof, such as a dock—State Act applies.

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6. See full discussion, *infra*, pages 8 to 11.

7. See full discussion, *infra*, pages 11 to 13.

The recent litigation in this area has not resulted from the inability of the Courts to apply the Congressional "situs test", but rather from the attempts, such as those, in these cases, by some employees and their attorneys to get the courts to amend the jurisdictional requirements of the Longshoremen's Act from the Congressional "situs test" to a "status test".<sup>8</sup>

## 4.

If the "status test" of the Court of Appeals below is adopted, many serious and difficult constitutional questions arise as a new constitutional line of jurisdiction will have to be drawn by the courts in determining how far ashore the admiralty and maritime jurisdiction of the United States can be constitutionally extended. This constitutional line will be even more difficult to draw based on "status" than it has been based on "situs" and will create chaos and "uncertainty as to the source, state or federal" of an employee's compensation remedy, the very uncertainty this Court abhorred and condemned in *Calbeck*.<sup>9</sup>

## 5.

A change from the Congressional "situs test" to the Fourth Circuit "status test" will result in much controversy which can be resolved only in administrative and judicial adversary proceedings. The employer will have to file reports of injury under both the federal and state acts and cannot safely start the payment of compensation until the employee's "status" has been determined and even such a determination by a court is not conclusive unless

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8. See full discussion, *infra*, pages 13 to 15.

9. See full discussion, *infra*, pages 15 to 19.



that court had some jurisdiction in the first place. Such a test thus destroys the self executing provisions of the Longshoremen's Act and denies the employee the rapid and speedy determination of the compensation benefits which is one of the socially desirable purposes of the Longshoremen's Act.<sup>10</sup>

## 6.

If there is to be a change from the Congressional "situs test" of jurisdiction to the Fourth Circuit "status test" or to some other test which some may think is more appropriate, this change should be made by the Congress and not by the courts by judicial interpretation as this Court specifically held in *Pillsbury* which involved a different section of the Longshoremen's Act. This is particularly true where no suggestion has ever been made to or by the Congress that this Court's application of the Congressional "situs test" is undesirable or wrong even though Congress has amended various sections of the Longshoremen's Act on six different occasions since it was first enacted in 1927, an average of once every 5 or 6 years, and had under consideration in 1967 and 1968 in the 90th Congress extensive proposed revisions to 11 of the 50 sections of the Act. This Congressional silence clearly demonstrates that "situs" and not "status" is the jurisdictional test which Congress originally intended and still wants to have applied to the Longshoremen's Act.<sup>11</sup>

10. See full discussion, *infra*, pages 19 to 23.

11. See full discussion, *infra*, pages 23 to 28.

## ARGUMENT

### Jurisdiction of Longshoremen's Act Has Always Been Based on SITUS and Not on STATUS

By relying substantially on two brief sentences (Appendix, pages 49-50) from this Court's opinion in *Calbeck*,<sup>12</sup> which are taken out of context and misconstrued,<sup>13</sup> and then completely ignoring the categorical and unequivocal statements directly to the contrary by this Court in no less than four places in *Calbeck*,<sup>14</sup> the Court of Appeals below in these cases arrived at an incredible and shocking conclusion. It concluded that when the Congress refused to describe the jurisdiction of the Longshoremen's Act in Section 3(a) as extending to injuries and deaths occurring

"within the admiralty jurisdiction of the United States."<sup>15</sup>

and instead deliberately chose to describe the jurisdiction of the Act as extending only to injuries and deaths occurring

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12. *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114 at 130, 8 L.Ed.2d 368, at 378, 82 S.Ct. 1196 (1962).

13. These two sentences are but only a small part of a quotation from a 1944 decision of the Court of Appeals for the Fifth Circuit in *DeBardleben Coal Corp. v. Henderson*, 5 Cir. 1944, 142 F.2d 481, at 483.

14. *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114 at 117, 120, 124 and 126, 8 L.Ed.2d 368, at 371, 373, 375, and 376, 82 S.Ct. 1196 (1962).

15. The Longshoremen's Act as initially submitted to Congress by the Department of Labor proposed that this language be used to describe how far jurisdiction under the Longshoremen's Act was to extend. See Hearings on S.3170, Senate Judiciary Committee, 69th Cong., 1st Sess., page 2.

"upon the navigable waters of the United States"<sup>16</sup>

that the Congress did not really mean what it said, but rather intended for the jurisdiction of the Act to extend to all injuries and deaths occurring

"within the admiralty jurisdiction of the United States" and whether they occurred "upon the navigable waters of the United States" or not was of no significance whatsoever!

In reaching this conclusion the Court of Appeals below even more shockingly surmised that this Court had arrived at this same incredible conclusion in *Calbeck*. In order to so conclude, the Court of Appeals below completely disregarded what can only be described as the very "heart" of this Court's decision in *Calbeck*:

"In sum, it appears that the Longshoremen's Act was designed

- (1) to ensure that a compensation remedy existed for all injuries sustained by employees on navigable waters,
- and
- (2) to avoid uncertainty as to the source, state or federal, of that remedy.

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16. This is the language used to describe the extent of the Longshoremen's Act jurisdiction as passed by the Congress. 33 U.S.C.A. §903(a). As the parenthetical expression "including any drydock" which follows these words in the Act is not involved here, it is not necessary to consider these words in these cases except to the extent that having expressly described the only type of dock—a drydock—to which the Longshoremen's Act was to extend, it is reasonable to assume that had Congress intended the jurisdiction of the Longshoremen's Act to extend to all docks they would not have confined it to a specific type of dock which itself was included only because it was upon the navigable waters of the United States.

Section 3(a) should, then, be construed to achieve these purposes."<sup>17</sup>

If the decision of the Court of Appeals below in these cases is permitted to stand,—that Congress intended the jurisdiction of the Longshoremen's Act to be "status oriented" rather than "situs oriented"—then the Congressional design—to ensure a compensation remedy for all injuries sustained upon navigable waters and to avoid uncertainty as to the source of that remedy, state or federal,—will once again be enshrouded in a fog of confusion and chaos. And this Court, after more than 40 years in which it has consistently held that jurisdiction under the Longshoremen's Act is to be determined by the Congressional "situs test", will have to embark together with its brethren of the lower Federal courts upon a completely new judicial voyage in which an attempt is made to determine what workers injured on land or extensions thereof meet the Fourth Circuit "status test" as employees "within the admiralty jurisdiction of the United States" and thus fall within the jurisdiction of the Longshoremen's Act.

For the Court of Appeals below to conclude that jurisdiction under the Longshoremen's Act is to be based on an employee's "function" or "status" rather than the "situs" of his injury after nearly 40 years of judicial decisions to the contrary in which as fine and definite a line between state and federal compensation jurisdiction has been drawn

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17. In the vernacular of the "men who go down to the sea in ships," this would probably be referred to as the "guts" of this Court's decision. *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114 at 124, 8 L.Ed.2d 368, at 375, 82 S.Ct. 1196. These two sentences have been set out in this form in this brief for emphasis and do not appear in the Court's opinion in this precise format, but only the parenthetical numbers 1 and 2 have been added, likewise for emphasis.

as it is humanly possible to do, is not only startling but shocking in its implications. Although the two sentences relied on by the Court of Appeals below from this Court's decision in *Calbeck's* may be so twisted and distorted as has been done beyond all rhyme or reason, the National Maritime Compensation Committee respectfully submits that this Court's actual decision in *Calbeck* cannot be so cavalierly disregarded no matter how appealing or strong may be the desire to permit those who have suffered injury to select whichever compensation remedy they may desire.

### **Situs Not Status Determines Harbor Worker's Remedy Too**

As previously indicated, this Court has always held, in cases involving injuries to true longshoremen, those engaged in loading or unloading a vessel, such as are involved in these cases, and as to shipyard workers, that the Congressional "situs test" and not the Fourth Circuit "status test" is to be used in determining jurisdiction as between the federal and state compensation acts. That this Congressional "situs test" is the one to be used in determining whether an employee's injury occurs within the jurisdiction of the Longshoremen's Act has been made even more clear in those cases in which injuries have been sustained by employees who do not fall within the normal concept of a "longshoreman", or "shipyard worker" but rather are better described as "harbor workers" for whose benefit the Longshoremen's & Harbor Workers' Compensation Act was also passed.

One of the most recent of these "harbor worker" cases

from this Court is the *O'Rourke* case<sup>18</sup> which involved an injury to a railroad brakeman while he was assisting in moving loaded railroad cars from a car float upon navigable waters onto the railroad tracks ashore. *O'Rourke* was a suit under the Federal Employers' Liability Act which provides the remedy available to railroad employees who are injured in the course of their employment.<sup>19</sup>

The Court of Appeals for the Second Circuit had held that as *O'Rourke* was engaged in railroad work on navigable waters, he was entitled to a railroad employee's remedy under the Federal Employers' Liability Act. Thus, the Second Circuit held that because of *O'Rourke's* "status" as a railroad employee, the "situs" of his injury upon the navigable waters of the United States was of no consequence or significance.<sup>20</sup> In reversing this "status test" of jurisdiction by the Second Circuit, this Court categorically held in *O'Rourke* that the "situs" of his injury upon navigable waters was determinative of the jurisdictional question between the Longshoremen's Act and the Federal Employers' Liability Act, and that what his "status" might be as a "maritime employee" or a "railroad employee" was of no consequence or significance:

" . . . If, then, the accident occurs on navigable waters, the (Longshoremen's) Act must apply . . . irrespective of whether he himself (the employee) can be labeled 'maritime'." (Parenthetical expressions added)<sup>21</sup>

18. *Pennsylvania Railroad Co. v. O'Rourke*, 344 U.S. 334, 97 L.Ed. 367, 73 S.Ct. 302 (1953).

19. 45 U.S.C.A., §51.

20. 194 F.2d 612.

21. *Pennsylvania Railroad Co. v. O'Rourke*, 344 U.S. 334, at 341, 97 L.Ed. 367, at 374, 73 S.Ct. 302 (1953).

A more categorical and unequivocal rejection of the contention that jurisdiction under the Longshoremen's Act is to be determined by the "status test" and not by the Congressional "situs test" as the Court of Appeals below held in these cases cannot be imagined. In *O'Rourke*, this Court simply reiterated its holding some 24 years earlier in 1929 in *Nogueira*,<sup>22</sup> only two years after the Longshoremen's Act was passed—that the "situs" of the injury upon navigable waters gave exclusive jurisdiction over O'Rourke's injury to the Longshoremen's Act to the complete exclusion of any and all other statutes. And this even though O'Rourke clearly met the "status test" of a railroad brakeman who was performing precisely the duties that any railroad brakeman would perform whether ashore or afloat at the time of his injury.

### **Congressional Situs Test Is Simple and Easy to Apply**

Perhaps it is the simplicity of the Congressional "situs test" which created the problems for the Court of Appeals below. The extent to which that Court obviously has strained in its efforts to rationalize and justify its disregard of nearly 40 years of the judicial application of the Congressional "situs test", perhaps illustrates better than anything else the chaos that will result if the Fourth Circuit "status test" becomes the basis of Longshoremen's Act jurisdiction rather than the very simple Congressional "situs test" which is now so clearly defined. The Congressional "situs test" is so simple and so self executing in substantially all cases that it completely "avoids uncertainty as to the source, state or federal," of the employee's

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22. *Nogueira v. New York, N.H. & H.R. Co.*, 281 U.S. 128, 74 L.Ed. 754, 50 S.Ct. 303 (1930).

compensation remedy, the very uncertainty which this Court abhorred and expressly condemned in *Calbeck*.<sup>23</sup>

With the Congressional "situs test" determination of the source of the employee's remedy, whether state or federal, is simple indeed:

1. If the situs of the injury is on the navigable waters of the United States, the federal Longshoremen's Act applies.
2. If the situs of the injury is upon the land or any extension thereof, such as a dock, the state act applies.

This simple test leaves possible jurisdictional questions to arise only in the very few cases which occur at the borderline of the navigable waters of the United States and the edge of the land or dock.

It has not been the inability of the Courts to apply the Congressional "situs test" in determining jurisdiction between the federal and state compensation remedies which has produced the litigation in this area in recent years. Rather, it has been the attempts by various longshoremen and harbor workers to try to get the courts to amend the jurisdictional requirements of the Longshoremen's Act from the Congressional "situs test" to a "status test" which has produced this litigation.

Since *O'Rourke* only the Court of Appeals below has been willing to so amend Section 3(a) of the Act and to ignore the consistent application of the "situs test" by this Court by advocating its own, and what will undoubtedly

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23. *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114, at 124, 8 L.Ed.2d 368, at 375, 82 S.Ct. 1196 (1962).



be chaotic, "status test". Only the unwillingness of some injured employees and their attorneys to accept the plain and unequivocal Congressional "situs test", clearly and unambiguously stated by the Congress, and repeatedly reaffirmed by this and other federal courts, has produced the recent litigation in this area.

**If Status Test Adopted Serious and Difficult  
Constitutional Questions Arise Which Will  
Create Chaos and Endless Litigation  
Under the Longshoremen's Act**

If the Fourth Circuit "status test" is to become the law despite its specific rejection by the Congress at the time the Longshoremen's Act was passed in 1927, the "uncertainty as to the source, state or federal" of an employee's compensation remedy which this Court abhorred and expressly condemned in *Calbeck* will become an everyday occurrence in all ports of the United States. Such a "status test" would require this and other federal courts to embark upon a new voyage in which many difficult and complicated constitutional questions would have to be resolved under the facts of individual cases on a case-by-case basis. While not all inclusive, a few of the difficult constitutional questions which will produce this chaos and confusion where certainty is so sorely needed are:

1. Since the Fourth Circuit "status test" is based on the extent to which the admiralty and maritime jurisdiction of the United States can be constitutionally extended ashore by the Congress, how far ashore onto dry land does the admiralty and maritime jurisdiction of the United States extend? Does it extend any further than to those injuries which

are consummated on land by vessels which are situated upon navigable waters of the United States which is the test of the Admiralty Extension Act?<sup>24</sup>

2. Can the admiralty and maritime jurisdiction of the United States be constitutionally extended to any employee whose "status" might cause him to be engaged in maritime employment wherever he may be located, whether on the dock, or the ship or at his stevedoring company employer's office downtown, many miles removed from the navigable waters of the United States? For example, if one stevedoring company employer has its office personnel who handle its longshore payroll in an office in the warehouse on the dock, do these office personnel, who clearly are maritime employees in the sense that they work for a company engaged only in maritime operations, meet the Fourth Circuit "status test" so that they are entitled to the federal rather than the state remedy even though such employees never perform any of their work upon the navigable waters of the United States? And if so, can the Longshoremen's Act be constitutionally extended to the same type of office employee of another stevedore who has its longshore payroll office downtown, many miles removed from any navigable waters, but who also occupies the same "status" as those employees in the office at the dock?
3. Does a shipyard worker, who performs all of his services in a machine shop at the shipyard without ever going aboard a vessel on navigable waters, but all of whose employment involves the fabrication

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24. 46 U.S.C.A. §740.

of parts of machinery, plates, etc. for use in the repair of vessels on navigable waters, meet the Fourth Circuit "status test" so he is entitled to compensation under the Longshoremen's Act although he never performs any work upon the navigable waters of the United States? Or what of the watchman or the guard at the entrance gate to the shipyard, who also never has occasion to go any closer to the water's edge or to a dock of any kind than does the shipyard worker in the machine shop, does he meet the Fourth Circuit "status test" for Longshoremen's Act Compensation purposes? Even if these shipyard workers meet the Fourth Circuit "status test", can the Longshoremen's Act be constitutionally extended to them?

4. Or does the driver of a laundry truck who perhaps once or twice a week has occasion to deliver laundry to a vessel meet the Fourth Circuit "status test" sufficient to entitle him to Longshoremen's Act compensation regardless of where his injury may occur? If so, does this Longshoremen's Act jurisdiction based on the Fourth Circuit "status test" apply only on those days when his deliveries take him to a vessel or does it apply to him wherever and whenever he may be injured at any time in the course of his employment whether he has any "maritime laundry" on his truck at the time or not? If so, is such an extension constitutional?
5. What employees of a steamship agency, whose sole business is to serve as agents for vessels both foreign and domestic while they are in port meet the Fourth Circuit "status test" sufficient to bring them within Longshoremen's Act jurisdiction? Do only those

employees of a steamship agency whose duties require them to go aboard vessels or down to the docks meet the Fourth Circuit "status test"? And if so, if they are injured in the office downtown, is their "status" such as to still entitle them to Longshoremen's Act compensation? If so, is this a proper constitutional extension of the maritime jurisdiction of the United States?

These questions are neither farfetched nor simple figments of anyone's imagination, but they are real and serious constitutional questions which the Fourth Circuit "status test" poses. And they can be resolved and settled, and a new constitutional line between the federal and state remedies can be ascertained only after years of extensive and far-flung litigation. We respectfully submit that the Court of Appeals below jumps much too far and much too fast over serious constitutional questions when it states "Beyond question, Congress could constitutionally ground jurisdiction on the function or status of the employee, . . . and thus extend coverage to all longshoremen injured during the loading, unloading, repairing or refitting of vessels regardless of the situs of the injury." (Appendix, page 48) As the foregoing questions graphically demonstrate, the constitutional questions are just not that simple, and determining the constitutional limits of jurisdiction of the Longshoremen's Act on the Fourth Circuit basis of "the function or status of the employee" cannot readily or easily be done. This for the simple reason that many important functions in the "loading, unloading, repairing or refitting of vessels" can be and are done by employees of stevedores, shipyards, ship suppliers, etc. whose work never requires them to go aboard a vessel or even in the vicinity of a dock or vessel,

even though their functions are as essential to the work being done for the vessel as that done by their fellow employees physically aboard the vessel or on the dock.

Any change from the Congressional "situs test" to the Fourth Circuit "status test" to determine jurisdiction under the Longshoremen's Act will produce even more litigation with even more difficult constitutional questions than those that have occurred in trying to draw the line between federal and state jurisdiction in the tidelands of the coasts of the United States with which this Court is thoroughly familiar.

### **Status Test Promotes Controversy, Destroys Self-Executing Provisions of Act and Delays Compensation Benefits**

That an enormous amount of controversy which can be resolved only in administrative or judicial adversary proceedings would be forthcoming immediately upon any change from the Congressional "situs test" to the Fourth Circuit "status test" is perhaps best illustrated by calling the Court's attention to the fact that under the Longshoremen's Act the one year period of time in which to file a claim does not begin to run on the date of the Longshoreman's injury unless a report of the injury has been filed by the employer with the Deputy Commissioner administering the Act within ten days of the injury date. If not filed within the ten day period allowed by the Act, Section 930(f)<sup>25</sup> provides that the one year period of limitations provided for in Section 913(a)<sup>26</sup> of the Act does not begin to run against the claim of the injured em-

25. 33 U.S.C.A. §930(f).

26. 33 U.S.C.A. §913(a).

ployee until such a report of injury has been furnished to the Deputy Commissioner as required by the Act.

Thus, in order to insure that the proper remedy, state or federal, has been selected under the Fourth Circuit "status test" in connection with any injury sustained by any of his employees, any employer who meets the statutory definition in the Longshoreman's Act—that is any "employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States"<sup>27</sup>—must file reports of injuries on all of his employees under the Longshoremen's Act "regardless of the situs of the injury." He must likewise file a report, if the injury occurs upon land or any extension thereof, such as a dock or pier, with the state workmen's compensation act authorities.

Before the employer can safely start the payment of compensation benefits under these circumstances, under the Fourth Circuit "status test", the employee's "status" must first be ascertained or determined. As this Court indicated in the concluding part of its opinion in *Calbeck*, unless and until a judicial or administrative proceeding has been held to determine whether the employee's compensation remedy is under the federal or the state act, which of the two acts has jurisdiction remains an open questions.<sup>28</sup> And once this determination has been made in an administrative or judicial proceeding under either the state or federal act, it is binding and effective only if there was some basis for jurisdiction under the state or federal act. If not, the judgment of the court who rendered it would be void for lack of jurisdiction, and the

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27. 33 U.S.C.A. §902(4).

28. *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114, at 131, 8 L.Ed.2d 368, at 379, 82 S.Ct. 1196 (1962).

employee would still be free to proceed to prosecute a claim under the other Act.<sup>29</sup>

Thus one of the basic and fundamental purposes of the Longshoreman's Act—to provide an almost immediate payment of compensation benefits in a substantially self-executing way without the intervention of any administrative officer or, proceeding—a purpose fully realized under the Congressional "situs test" of jurisdiction, will be completely thwarted and hopelessly bogged down in a mass of administrative and judicial proceedings.

If Section 3(a) is to be construed to achieve the Congressional purposes which this Court emphasized in *Calbeck*:

- 1, "... to ensure that a compensation remedy existed for all injuries sustained by employees on navigable waters,
- and
2. "to avoid uncertainty as to the source, state or federal, of that remedy,"<sup>30</sup>

29. Not only is this clearly indicated by this Court's decision in *Calbeck*, but has been the result reached by several lower federal courts.

See:

*Western Boat Building Co. v. O'Leary*, 9 Cir. 1952, 198 F.2d 409;

*Newport News Shipbuilding & Drydock Co. v. O'Hearne*, 4 Cir. 1951, 192 F.2d 968;

*Flying Tiger Lines, Inc. v. Landy*, N.D. Cal. 1965, 250 F.Supp. 282; affirmed 9 Cir. 1966, 370 F.2d 46;

*Globe Indemnity Co. v. Calbeck*, S.D. Tex. 1959, 230 F.Supp. 9;

*Gulf Oil Corporation v. O'Keefe*, E.D. S.C., 1965, 242 F.Supp. 881;

*Puget Sound Bridge & Drydock Company v. O'Leary*, W.D. Wash. 1966, 260 F.Supp. 260.

30. *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114, at 124, 8 L.Ed.2d 368, at 375, 82 S.Ct. 1196 (1962).

the Congressional "situs test" must be reaffirmed and the amphibious, ambiguous Fourth Circuit "status test" in these cases must be rejected. To do otherwise is to effectively defeat, not only the above two Congressional purposes, but the additional socially desirable purpose of securing to an injured employee a rapid and speedy determination of compensation benefits under a statute that was designed to be automatic and almost completely self executing by its own terms.<sup>31</sup>

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31. The self executing nature of the Longshoremen's Act was summarized by now Chief Judge Brown of the Court of Appeals for the Fifth Circuit in the following language:

"Unlike some State compensation acts, the Longshoremen's Act is almost self-executing. Compensation benefits are payable and paid, medical care and attention furnished, generally without even the necessity of filing a formal claim, as such, almost universally without a formal hearing by the Deputy Commissioner, only in a few cases does the matter proceed to formal hearing and award and even more rare is the resort to the limited judicial review. The heart of any such system is the mandatory report of an injury by the employer within 10 days under §930(a). A failure to file subjects the employer to the sanctions of civil penalties, §930(e). With this the Act moves swiftly to require affirmative action by the employer. If disability persists for the statutory minimum, payments of compensation must be commenced within 14 days, §914(b). The only thing which excuses this is a formal controversion filed by the employer, §914(d). Failure to commence and continue payment of compensation benefits and to furnish requisite medical aid, care and attention where no controversion is filed subjects the employer again to substantial sanctions, §§914(e) and (f)." *Flowers v. Travelers Insurance Company*, 5 Cir. 1958, 258 F.2d 220, at 225.

But it is not only the employer who is put in this dilemma simply because he had to make the first decision as to which is the proper remedy, for ultimately the choice must be made by the employee himself as to the act under which his claim will be processed, whether state or federal.



### Any Change From Situs Test to Status Test Should Be Made By Congress

Since it was first called upon in 1929 to construe the meaning of the jurisdictional words—"upon the navigable waters of the United States"—contained in Section 3(a) of the Longshoremen's Act<sup>32</sup> this Court has repeatedly held that the "situs" of the injury upon navigable waters determines jurisdiction and not the "status" or function of the employee at the time of his injury. This uniform approach to the construction of this section of the Act for nearly 40 years by this Court cannot be so lightly discarded as it was by the Court of Appeals below.

Only a few years ago when this Court was asked to depart from a prior jurisdictional decision in which it had held that a civilian seaman employee of the United States government had as his only remedy for injury or death the Federal Employees Compensation Act,<sup>33</sup> this Court in declining to change its prior jurisdictional holding said:

" '(W)hen the questions are of statutory construction, not of constitutional import, Congress can rectify our mistake, if such it was, or change its policy at any time, and in these circumstances reversal is not readily to be made.' *United States v. South Buffalo R. Co.*, 333 U.S. 771, 774, 775, 92 L.ed. 1077, 1080, 1081, 68 S.Ct. 868. If civilian seamen employed by the Government are to be accorded rights different from or greater than those which they enjoy under the Compensation Act, it is for Congress to provide them."<sup>34</sup>

32. 33 U.S.C.A. §3(a).

33. 5 U.S.C.A. §8101.

34. *Patterson v. United States*, 359 U.S. 495, at 496, 3 L.Ed.2d 971, at 972, 79 S.Ct. 1293 (1959).

The Congressional "situs test" presents no constitutional questions because nothing could be clearer than that the navigable waters of the United States are squarely within the Constitutional grant of admiralty and maritime jurisdiction to the Federal government. If there is to be any change in the Congressional policy from a "situs" to a "status test", it should clearly come from Congress and not by judicial interpretation. And this is particularly true where any change to such a "status test" will present many serious and difficult constitutional questions which can be resolved only after many years of what can only be almost endless litigation.<sup>35</sup>

That Congress will undertake, on some occasions, at least, to rectify what it considers to be a "mistaken" interpretation of a section of the Longshoremen's Act by this Court, or to change the policy of the Act, can best be demonstrated by referring to this Court's interpretation of Section 13(a) of the Longshoremen's Act in the *Pillsbury* case.<sup>36</sup> Section 13(a) of the Act provides that compensation for disability is barred unless a claim is filed within one year after the injury.<sup>37</sup> In *Pillsbury*, it was contended that the word "injury" as used in this section of the Act should be construed to mean "disability" so that an injured employee could file a claim at any time within one year after the injury had resulted in disability. In declining to so amend the statute this Court stated in part:

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35. See prior discussion these constitutional questions, *supra*, pages 15 to 19.

36. *Pillsbury v. United Engineering Co.*, 342 U.S. 197, 96 L.Ed. 225, 72 S.Ct. 223 (1952).

37. 33 U.S.C.A. §913(a).

"We are not free, under the guise of construction, to amend the statute by inserting therein before the word 'injury' the word 'compensable' so as to make 'injury' read as if it were 'disability'. Congress knew the difference between 'disability' and 'injury' and used the words advisedly . . . . Congress meant what it said when it limited recovery to one year from date of injury, and 'injury' does not mean 'disability'.

*We are aware that this is a humanitarian act, and that it should be construed liberally to effectuate its purposes; but that does not give us the power to rewrite the statute of limitations at will, and make what was intended to be a limitation no limitation at all. Petitioners' construction would have the effect of extending the limitation indefinitely if a claim for disability had not been filed; the provision would then be one of extension rather than limitation. While it might be desirable for the statute to provide as petitioners contend, the power to change the statute is with Congress, not us.*"<sup>38</sup> (Emphasis supplied)

To meet this construction of Section 13(a) of the Act, the Department of Labor included in the extensive bills which it had introduced in both Houses of the Congress in the fall of 1967 an express provision that "the time for filing a claim shall not begin to run until the employee or his beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment."<sup>39</sup> Thus

38. *Pillsbury v. United Engineering Co.*, 342 U.S. 197, at 199, 96 L.Ed. 225, at 229, 72 S.Ct. 223 (1952).

39. See Hearings on S. 2489, Sub Committee on Labor of the Senate Committee on Labor and Public Welfare, 90th Congress, 1st and 2nd Sessions, pages 9-10. The Senate bill was introduced on September 29, 1967, and an identical bill was introduced in the House of Representatives as H.R. 13314 on October 4, 1967.

when this Court has construed a section of the Longshoremen's Act in such a way that the Department of Labor, which is charged with the responsibility for administering the Act, believes either a "mistake" has been made or the policy of the Act needs to be changed, they proceed to introduce in the proper forum the necessary legislation to try to effectuate a change.

What was said by this Court in *Pillsbury* applies with even greater force to the cases presently before the Court which involve the jurisdictional section of the Act. As previously indicated, this Court has applied the Congressional "situs test" to Section 3(a) of the Act since 1929. Although the Congress has amended various sections of the Act on numerous occasions—in 1934, 1938, 1948, 1956, 1959 and 1961—not one single suggestion has ever been made that this Court's application of the Congressional "situs test" to determine the jurisdiction of the Act is undesirable or "mistaken" and that the Fourth Circuit "status test" or any other jurisdiction test should be substituted for it. Nor is there any such suggestion or proposal to depart from the Congressional "situs test" contained in the Department of Labor's comprehensive bills to amend the Longshoremen's Act introduced in both Houses of the Congress in the fall of 1967. And this even though the proposed 1967 amendments would amend 11 of the 50 sections of the Act, repeal another section and add one additional section.<sup>40</sup>

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40. The full text of the proposed 1967 amendments can be found on pages 3 to 21 of the Hearings on S. 2485, Sub Committee on Labor of the Senate Committee on Labor and Public Welfare, 90th Congress, 1st and 2nd Sesiions. Neither the Senate Sub Committee on Labor nor the committee to which the identical 1967 amendments in H.R. 13314 were referred in the House completed their work on the proposals. Undoubtedly these same bills or revisions of them will be re-introduced in the 91st Congress either this year or next,

This Congressional silence for over 40 years during which it has considered amendments to the Longshoremen's Act on an average of once every 5 or 6 years is of no small significance as this Court once said:

"It is true that the silence of Congress, when it has authority to speak, may sometimes give rise to an implication as to the Congressional purpose. The nature and extent of that implication depends upon the nature of the Congressional power and the effect of its exercise."<sup>41</sup>

Only one possible implication from the silence of Congress for over 40 years can be drawn—it fully agrees with this Court's application of its "situs test" in determining jurisdiction under Section 3(a) of the Act. And the implication is strong indeed since the nature of the Congressional power in this area is absolute under the Constitutional grant of the admiralty and maritime jurisdiction to the Federal government.

If there is to be a change from the Congressional "situs test" as aproved by this Court in determining jurisdiction under Section 3(a) of the Longshoremen's Act, either to the Fourth Circuit "status test" or to some other "test" which might be considered more appropriate, we respectfully submit it should be made only by the Congress through its careful, deliberative process where what is truly in the best interest of all concerned may best be determined.

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and it would, of course, be a simple matter for the Congress to revise the jurisdictional section of the Act if it thinks that this is necessary or desirable in connection with the re-introduction of these bills.

41. *Graves v. New York*, 306 U.S. 466, at 479, 83 L.Ed. 927, at 932, 59 S.Ct. 595.

## CONCLUSION

For the foregoing reasons, the National Maritime Compensation Committee respectfully submits that the already well drawn jurisdictional line based on the "situs test" should not be replaced by the Fourth Circuit "status test", which can only produce much confusion and chaos as a new constitutional jurisdictional line is drawn on a case-by-case basis, and therefore, that the decision of the Court of Appeals below in these cases should be reversed and those of the District Courts below reinstated.

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I certify that copies of the foregoing Brief Amicus Curiae have been served on the attorneys for all parties herein by depositing the same in a United States mail box with first class air mail postage prepaid, addressed to counsel of record at the following post office addresses on this the 21st day of January, 1969:

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IN THE  
**Supreme Court of the United States**

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OCTOBER TERM, 1968

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**Nos. 528 and 663**

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**NACIREMA OPERATING CO., INC. AND LIBERTY MUTUAL  
INSURANCE COMPANY, *Petitioners,***

**v.**

**WILLIAM H. JOHNSON, JULIA T. KLOSEK  
AND ALBERT AVERY, *Respondents.***

---

**JOHN P. TRAYNOR AND JERRY C. OOSTING,  
Deputy Commissioners, *Petitioners,***

**v.**

**WILLIAM H. JOHNSON, JULIA T. KLOSEK  
AND ALBERT AVERY, *Respondents.***

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**BRIEF FOR RESPONDENTS**

**WILLIAM H. JOHNSON and JULIA T. KLOSEK**

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**OPINIONS BELOW**

The statement in the Brief of the Deputy Commissioners  
is adopted.

**JURISDICTION**

The statement in the Brief of the Deputy Commissioners  
is adopted.



## STATUTES AND LAW INVOLVED

The statement in the Brief of the Deputy Commissioners is adopted with the following supplement:

### Constitution of the United States

Article 1, Section 8, Clause 3. Regulation of commerce.  
(The Congress shall have Power . . .)

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Article 3, Section 2, Clause 1. Jurisdiction

The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction; . . .

## QUESTION PRESENTED

Does the Longshoremen's and Harbor Workers' Compensation Act cover injuries occurring "upon the navigable waters of the United States" on the deck of a pier as well as the deck of a ship when the precipitating instrumentality is a shipboard crane?

## STATEMENT

The statement in the Brief of the Deputy Commissioners, as to the Johnson and Klosek cases (pp. 4-6), is adopted.

The Court of Appeals in a 5-2 en banc decision held that the injury and death were compensable under the Longshoremen's and Harbor Workers' Compensation Act and remanded the cases. Former Chief Judge Sobeloff, speaking for the majority, cited four reasons for the decision, any one of which was deemed sufficient to establish coverage under the Act. The grounds for the decision were:

1. Congress possessed the constitutional authority to cover all longshoremen injured during the loading, unloading, repairing or refitting of vessels, and exercised the full scope of its authority by designing the Act to reach all

injuries sustained by longshoremen in the course of their employment; it did not intend to "freeze coverage to injuries occurring within the admiralty tort jurisdiction as it was thought to exist in 1927 . . ." (398 F. 2d at 904; App. 48).

2. If, for the purpose of argument, one assumes Congress had exercised the more limited tort jurisdiction, the phrase "upon navigable waters" must be "construed to include the full range of the legislatively and judicially expanded concept of maritime jurisdiction" (398 F. 2d at 906; App. 52).

3. Small vessels are able to navigate beneath the piers. "These waters are therefore navigable in fact" (398 F. 2d at 908; App. 55, 56).

4. This Honorable Court has twice mandated the humanitarian Act "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results . . ." and has admonished "(those) subject to the same danger . . . (are) entitled to like treatment under law." The Court of Appeals also adverted to the observations of Judge Soper that "the references therein to 'maritime employment' and the injury 'upon the navigable waters of the United States . . . ' should be broadly construed," and that the coverage of the Act "should not be frustrated by needless refinements" (398 F. 2d at 906-909; App. 52-56).

## ARGUMENT

### I.

#### Introduction and Definition of Issues

Contemporary Admiralty principles — whether pertaining to maritime employment, maritime jurisdiction or navigable waters — are expanding with such dizzying speed

that Judge Boreman of the Court of Appeals for the Fourth Circuit was led to observe in the longshoreman third-party case of *Scott v. Isbrandtsen Company*, 327 F. 2d 113, 123 (1964):

"The case books are full of decisions of the inferior federal courts and may serve, in some instances, to illustrate a trend but accepting or following them as authoritative suggests a spirit of *reluctance to heed the changes and is sheer folly*. As precedents they may be *here today and gone tomorrow*." (Unless otherwise indicated, emphasis throughout is added.)

Over a decade ago, Gilmore and Black aptly stated in their "The Law of Admiralty" (1957), footnote 12, page 253:

"... since the Supreme Court has claimed the field of maritime personal injury litigation as its own, *lower court decisions have suffered from rapid technological obsolescence*."

The above quotations came promptly to mind after a reading of the briefs filed by Petitioners and the Amicus in support of the Petitioner's position. A commentator with a knack for penchant observations once remarked: Some lawyers are so devoted to the past that they refuse to look at the new moon lest they be accused of disloyalty to the old. By actual tally, of this Court's cases cited in the Brief of Petitioners Nacirema Operating Co., Inc. and Liberty Mutual Insurance Company, only two were decided within the decade 1950-59 and one since 1960; one was decided within the decade 1940-49 and the remaining ten during the early part of this century and the second half of the last century. Of the fourteen cases from this Court cited by the Petitioners Deputy Commissioners, only two fall within the last two decades; the others date all the way back to the 1910-19 decade.

While we are in the prelude portion of the Brief, we might advert to the fact this Court is considering cases involving longshoremen members of a gang who were actively engaged in loading an ocean going freighter tied up at a pier; longshoremen whose duties, rest and lunch periods required them to go back and forth between the vessel and the pier. In the words of the Court of Appeals opinion, below: "... the injured longshoremen were members of a gang all of whom did basically the **same work** for the **same pay** and were subjected to the **same risks**, passing freely from ship to pier in the course of their work" (App. 53).

The cases under review involve injuries on the deck of a pier upon navigable waters rather than a ship upon navigable waters. They have nothing whatever to do with a messenger going to an "office downtown", a shipyard worker in a "machine shop", the "driver of a laundry truck" or an employee of a "steamship agency", or any of the other situations conjured up in the Brief of the Amicus. (These far-fetched illustrations are reminiscent of the "faulty cargo in Denver" fantasy argument rejected by the Court in *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206, 10 L. Ed. 2d 297 (1963)). We are dealing solely and exclusively with the rights of members of a longshoreman work unit known as a "gang", the duties of whom are substantially interchangeable; in loading or discharging a vessel, some are assigned to work aboard ship and others a few feet away on the pier. The Brief of the Deputy Commissioners recognizes this fact in its admission "it is not uncommon for the men to rotate positions and **pass back and forth between the ship and the pier** during a given loading operation (pp. 4, 5).

What this Court is being called upon to decide is "not of constitutional magnitude", to borrow an expression from

*Parker v. Motor Boat Sales*, 314 U.S. 244, 248, 86 L. Ed. 186, 190. As shown by *O'Donnell v. Great Lakes Co.*, 318 U.S. 36, 1943, and *Hopson v. Texaco*, 383 U.S. 262, 1966, a constitutional question is not involved in this controversy. The allusions to *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920) and *Washington v. Dawson & Co.*, 264 U.S. 219, found in both the Brief of Nacirema and the Brief of Deputy Commissioners are only of historic and academic interest. In substance, each of these cases held that the field of admiralty was exclusively that of the federal government by constitutional grant and that the states could not be permitted to invade that domain, either with or without attempted congressional sanction.

The instant cases look in the other direction. The crucial question is not whether states, with their varying local provisions, may be permitted to interfere with and possibly destroy the uniformity so requisite in the maritime field; it is whether the federal government may legislate in a field over which, according to pre-1927 precedents, the states may also have exercised some degree of dominion. A large number of the cases cited by Petitioners relate to how far this Court has been willing to permit the states to go in legislating in this area. The question in these decisions was, accordingly, one of permissiveness by and not limitation upon the authority of the federal government.

It is too well settled at this time to dispute that even the admiralty power alone is sufficient to support congressional extension of admiralty jurisdiction to damage and injury consummated on wharves and piling clusters as a result of acts and omissions occurring upon navigable waters. Limitation of Liability Act, 1884, 46 U.S.C. 189, *Richardson v. Harmon*, 222 U.S. 96, 106 (1911); *Rivers and Harbors Act*, 1890, 33 U.S.C. 403, et seq., *The Blackheath*, 195 U.S. 361,

364 (1904); Jones Act, 1920, 46 U.S.C. 688, *O'Donnell v. Great Lakes Co.*, 318 U.S. 36, 39 (1943); Admiralty Extension Act, 1948, 46 U.S.C. 740, *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206, 210 (1963).

The power of Congress is not restricted by concepts of admiralty jurisdiction as the lower federal courts have already recognized in cases involving other statutes regulating the employment relationship of maritime workers both ashore and afloat and whether building, repairing, unloading or otherwise servicing vessels. Illustrative cases are: *N.L.R.B. v. Norfolk S.B. & D.D. Corp.*, 109 F. 2d 128 (4 Cir., 1940); *Bracey v. Luray*, 138 F. 2d 8, 11 (4 Cir., 1943); *Slover v. Wathens*, 140 F. 2d 258 (4 Cir., 1944); *Newport News S.B. & D.D. Co. v. N.L.R.B.*, 101 F. 2d 841 (4 Cir., 1939). See also *Gilmore & Black, Admiralty* (1957), p. 45: "Congress may legislate for maritime matters under any of the powers given it."

The complementary character of the admiralty and commerce powers (Art. III, sec. 2 and Art. I, sec. 8, respectively) has been familiar since the decisions of Story and Marshall more than a century ago — *United States v. Coombs*, 12 Pet. 72, 76-79 (1838); *Gibbons v. Ogden*, 9 Wheat 1, 189-192 (1824). The two powers are entirely distinct and independent; either or both may be invoked; neither limits the other. *The Genesee Chief*, 12 How. 443, 452 (1851); *The Lottawanna*, 21 Wall. 558, 577 (1875).

Basically, the review revolves about the correct, liberal interpretation of a simple term "upon the navigable waters of the United States" . . . In substance, the Court of Appeals below held that literally "upon the navigable waters of the United States" applies equally to all structures on navigable waters whether the structure be a ship or a pier, and to all injuries, whether the longshoreman be working on

the deck of a ship or the deck of an adjacent pier. The Solicitor General's Brief (at p. 12) quotes the statement of his *Calbeck* Brief that docks and piers, no less than ships, are upon navigable waters (*Gladden v. Stockard S.S. Co.*, 184 F. 2d 510, 512, 3 Cir., 1950).

In the Government's Brief filed as Respondent and supporting the affirmance of the award of benefits in *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114, 8 L. Ed. 2d 368, 1962, the Solicitor General had occasion to compare the benefits available under the federal and the state acts. A similar computation may prove helpful here. Under the Maryland Workmen's Compensation Act, the widow was entitled to up to \$48.00 a week for a maximum of 500 weeks, but not to exceed \$15,000. At the time of her husband's death, November 14, 1963, Mrs. Klosek was 49 years of age; she was left with three minor children, whose dates of birth were March 31, 1947, March 11, 1950 and July 30, 1955. If Mrs. Klosek lives her normal life expectancy, she will receive \$45,419.50; the children, collectively, will receive \$17,473.75; the total for the family will be \$62,893.25. The benefits under the federal act are, accordingly, more than four times those payable under the state statute.

The juxtaposition of these figures underscores what is probably the predominant issue of these cases, as far as the Amicus National Maritime Compensation Committee is concerned. It is hard economics — simply a question of dollars and cents. In maritime and compensation cases this Court has consistently adhered to the humanitarian view the "human" cost of doing business should be borne by the industry and not saddled upon the disabled workman or his bereaved family. The decisions point out this is much fairer since such costs can be equitably distributed throughout the business enterprise by available insurance.

## II.

**The Longshoremen's Act is remedial legislation and is to be applied with the broadest liberality to achieve its humanitarian purposes.**

One of the early cases in which this Court expressed its solicitude for the safety and welfare of employees engaged in the hazardous occupation of longshoring was *International Stevedoring Co. v. Haverty*, 272 U.S. 50, decided October 18, 1926, before the enactment of the Longshoremen's statute. From *Voris v. Eikel*, 346 U.S. 328, 98 L. Ed. 5 (The act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.) and *Avondale Marine Ways Inc. v. Henderson*, 346 U.S. 366, 98 L. Ed. 77 (A death on a marine railway 400 feet inland from the water's edge was held compensable under the Act.) (both decided in 1953), through *Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25, 15 L. Ed. 2d 21 (Defense Bases Act, 1965) to *Jackson v. Lykes Bros. Steamship Co., Inc.*, 386 U.S. 731, 18 L. Ed. 2d 488 (1967) (The widow of a longshoreman was permitted to bring a suit against the shipowner who was the direct employer of the decedent.) and *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 20 L. Ed. 2d 30 (1968) (Section 22 of the Act was liberally interpreted to permit a longshoreman's widow to file and recover on a second claim after her first claim was rejected.) there has been a steady procession of cases in which the Act has been applied with sympathetic liberality.

It is elementary that the Act should be applied with the utmost compassion. Reasons should be sought by the Courts to grant remedial awards under the umbrella of its coverage; rationalizations should not be resorted to in an attempt to justify an improper denial thereof. Every doubt must be resolved and every presumption, including that of



coverage, exercised in favor of the claimant (See 33 U.S.C. 920(a)).

A. THIS COURT HAS MANDATED AT LEAST TWICE THAT  
IN THE APPLICATION OF THE ACT "HARSH AND  
INCONGRUOUS" RESULTS MUST BE AVOIDED.

Mr. Justice Black delivered the opinion in the momentous *Reed v. SS YAKA*, 373 U.S. 410, 10 L. Ed. 2d 488, 1963. In brief, this Court decided that the vessel could be held liable in rem because her bareboat charterer could be held liable in personam, even though the charterer was also the direct employer of the longshoreman — a status which normally would have insulated it from third party or liability actions. One of the most interesting of the case's many fascinating facets is highlighted in this brief excerpt:

"We have previously said the Longshoremen's Act **'must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.'** We think it would produce a harsh and incongruous result, one out of keeping with the **dominant intent of Congress to help longshoremen**, to distinguish between liability to longshoremen injured under precisely the same circumstances because some draw their pay directly from a shipowner and others from a stevedoring company doing the ship's service. . . . As we said in a slightly different factual context, **'All were subjected to the same danger. All were entitled to like treatment under law'**" (373 U.S. at 415).

Ten years earlier this Court admonished that the Act's purposes must not be distorted to bring about a "harsh and incongruous" result (*Voris v. Eikel*, 346 U.S. 328, 1953).

In the instant cases the Act should be applied to longshoremen unloading or loading the ship **"whether they are standing aboard ship or on the pier"**, to lift a phrase from

*Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206, 10 L. Ed. 2d 297. It would be surpassing strange if the same acts or omissions which give rise to third-party tort claims under federal admiralty jurisdiction were held insufficient to give rise to federal compensation claims. Since this Court because of its concern for the welfare of longshoremen has construed the "open-end" seaworthiness doctrine liberally, should it not interpret the Compensation Act just as broadly? If a longshoreman is entitled to the extraordinary remedy of the seaworthiness doctrine, a fortiori he is entitled to the ordinary remedy of the compensation act.

The Act must be applied in such a fashion as to avoid harsh and incongruous results. Certainly, it would be "harsh and incongruous" to deprive the decedent's widow and family of the protection afforded by the provisions of the Longshoremen's Act and relegate them to the poverty anchored remedy of the stateside compensation schedule. Johnson and the decedent were working upon navigable waters while on the pier, just as other members of the same gang were working upon navigable waters while on the ship; some went back and forth in the course of their work. It is the cruelest type of incongruity to afford one and deny the other the benefit of the Act. In the words of this Court "All were subjected to the **same danger**. All were entitled to **like treatment** under law". Just as this Court in *Reed* refused to "distinguish between liability to longshoremen" because some drew their pay directly from a shipowner and others from a stevedoring company doing the ship's service, so it should refuse to distinguish between injuries sustained on the deck of a ship and on the deck of a pier located "upon navigable waters".

There are two main categories of cases embraced in the Act — injuries sustained upon a "drydock" and those suffered upon "navigable waters", both of which should be

held compensable with consistent liberality. The "drydock" decisions are too plentiful to be developed in detail herein. We wish, however, to call attention to *Holland v. Harrison Bros. Drydock and Ship Repair Yard, Inc.*, 306 F. 2d 269 (5 Cir., 1962) and these excerpts from the opinion of Judge Wisdom:

"Harrison Brothers counters that when a worker is injured with *both feet planted on dry earth*, there is no federal coverage regardless of whether he may be standing at the water's edge or near a dry dock" (370).

"It seems reasonable to us that any meaningful definition of marine railway should include the land immediately adjacent to the tracks 'that is beneath a ship drawn up on the railway and that must be used in the course of repairing any ship on the railway'. This argument draws strength from the fact that the **general assignment** Holland was performing was of a **basically maritime nature**" (372).

"In determining whether a worker's personal injury claim falls within the federal admiralty jurisdiction or the jurisdiction of the state, courts have regularly looked to both the locality of the accident and the **nature of the work being performed**. The literal language of the Longshoremen's Act seems to concern only the locality of the accident, but the **history** of the Act indicates that its **underlying purpose** was to **embrace the admiralty jurisdiction whatever that might be**." (Citations omitted.) (fn. 4, 372).

The Court of Appeals for the Fourth Circuit, in *Newport News S. B. & D. D. Co. v. O'Hearne*, 192 F. 2d 968, 1951, warned against defeating the beneficent purposes of the Act. Viewing the Act against the backdrop of *Davis v. Department of Labor* 317 U.S. 249, 256-257 (1942), and *Parker v. Motor Boat Sales*, 314 U.S. 244, 249-250, Judge Soper concluded: "The references to 'maritime employment' and injury 'upon the navigable waters of the United States (including any dry dock),' should be broadly con-

strued;" and, further, that the coverage of the act "should not be frustrated by needless refinements" (192 F. 2d at 971).

In *Avondale Marine Ways, Inc. v. Henderson*, 346 U.S. 366, 1953, this Court affirmed, per curiam, as "upon navigable waters" an award for fatal injuries sustained on a barge on a marine railway, 400 feet from the water. The Courts have been particularly responsive to affording coverage under the Act to "dry land" injuries. The term "drydock" has been construed to include, graven docks and marine railways as well as the land immediately adjacent thereto. In the Fifth Circuit 1965 *Holland* decision, *supra*, the Court said "any meaningful definition of marine railway should include the land immediately adjacent." Sixteen years earlier the same Circuit in *Maryland Casualty Co. v. Lawson*, 101 F. 2d 732, 733 held the adjacent land was included because "the land was part of the yard necessary to the operation of the marine railway." Philosophically, logically and practically, isn't a pier just as "necessary to the operation" of a ship?

The "incongruous" borders on the ludicrous when an injury sustained 400 feet inland not on a standard drydock, but on a marine railway is held compensable whereas one suffered on a pier jutting 500 feet upon navigable waters is challenged.

#### B. THE ACT'S LEGISLATIVE HISTORY SUPPORTS A LIBERAL APPLICATION.

As former Chief Judge Sobeloff asserted in the opinion below, "Prolonged discussion of this issue is now unnecessary, however, since it has been authoritatively resolved by the Supreme Court in *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114 (1962)." Quoting with approval the Fifth

Circuit in *Debardelen Coal Corp. v. Henderson*, 142 F. 2d 481 (1944), the Court stated (App. 49, 50):

"The elaborate provisions of the Act, viewed in light of prior Congressional legislation as interpreted by the Supreme Court, leaves no room for doubt, as it appears to us, that Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject matter. . . . It is sufficient to say that Congress intended the compensation act to have a coverage co-extensive with the limits of its authority." 370 U.S. at 130 (Emphasis in Judge Sobeloff's opinion.)

See also the footnote discussion on pages 49 and 50 of the Appendix, particularly the excerpt from *Holland v. Harrison Bros.*, 306 F. 2d 369, 373 n. 4 (1962).

The all embracing nature of the Act is apparent from its title "An Act to Provide Compensation for Disability of Death Resulting from Injury to Employees in Certain Employments", Act of March 4, 1927, 44 Stat. 1424. Judge Dobie in *Travelers Ins. Co. v. Branham*, 136 F. 2d 873, 875 (4 Cir., 1943) logically concluded:

"It would seem that Congress, in the Act, intended to exercise to the fullest extent all the power and jurisdiction it possessed over the subject."

The following year, Judge Hutcheson of the Court of Appeals of the Fifth Circuit in *DeBardleben Coal Corp. v. Henderson*, 142 F. 2d 481, 483, expressed it thus:

"Congress intended the Compensation Act to have a coverage co-extensive with its authority . . . in the application of the Act, therefore, the broadest ground it permits should be taken."

In applying the Longshoremen's Act, the question, therefore, is the reach of the Admiralty and Commerce powers, taken together, not that of the Admiralty power alone.

Congressionally, the Longshoremen's Act traces its origin to February 1926, when S. 3170 and H.R. 9498 were introduced in both Houses. Two previous attempts to enact a law acceptable to this Court — 40 Stat. 395, Act of October 6, 1917 and 42 Stat. 634, Act of June 10, 1922 — failed. The first draft of the 1926 bill, prepared by the International Longshoremen's Association in conjunction with the American Association for Labor Legislation, was based on the New York law. The legislative history continues through the Senate Concurrence in House Amendments, March 4, 1927.

The debates were relatively brief and concerned themselves principally with the exclusion of crew members from the Act and maintaining \$7,500 as the maximum limit of all benefits, including death or permanent injury. (Senate debates, June 3, 1926, 67 Cong. Rec. 10608-14; House debates, March 2, 1927, 68 Cong. Rec. 5402-14; Senate Concurrence in House Amendments, March 4, 1927, 68 Cong. Rec. 5900-09).

At the first session of the Committee on the Judiciary of the Senate held March 16, 1926, Mr. L. B. Clark, on behalf of the U. S. Bureau of Labor called attention to Congress' authority over the "commerce power" and explained "It is the earnest desire of Commissioner Stewart that a bill should cover the contract, cover the job and not the man simply when he is on the ship." (Despite the position taken by the Solicitor General in these cases, it is Respondents' understanding that the Department of Labor still adheres to that view at the present time, and in this very case. It is believed the delay in the Government's filing a petition for a writ was attributable to the Department's continuing support of the Fourth Circuit decision).

A careful reading of the legislative history discloses that the Union and Labor representatives were understandably interested in full coverage — the 25% who work and are injured on the pier as well as the 75% who labor and are injured aboard ship. The government wanted a comprehensive bill to “cover the job”. Management was unanimous in favoring complete coverage. The legislature kept searching for a formula sufficiently comprehensive to cover all maritime workers, and kept striving for “uniformity”. Most authoritative is Congressman La Guardia’s summation on the day the bill was passed by the house; *“This law simply gives the longshoreman the benefit of up-to-date legislation to cover injuries sustained in the course of their employment. That is all there is to it”* (p. 5414).

No one challenged the correctness of his explanation of the bill. That same day it was passed by the overwhelming vote of 265 to 7 by the House.

Indicative of the support of management for the bill are these excerpts from various spokesmen:

Mr. George H. Emerson, International Mercantile Marine Company. “In principle, the International Mercantile Marine Company is very much in favor of a compensation law which will compensate longshoremen . . . **We have made no difference between men who were injured on the dock and those injured on the vessels . . .**” (p. 76).

Walter J. Peterson, Esq., Pacific American Steamship Association, et al. From his association’s written statement, he read this sentence:

“That a federal maritime workmen’s compensation act be enacted, which shall provide for the payment of reasonable compensation to **maritime workers** injured, and to the dependents of those killed, **in the course of their employment**, except for injuries wilfully self-inflicted.” (48)

Henry C. Hunter, Esq., Council of American Shipbuilders, Inc., et al. "The shipbuilders generally are in favor of the **principle** embodied in this bill. We favor workmen's compensation . . ."

Cletus Keating, Esq., American Steamship Owners Association. "The Association is heartily in favor of a Workmen's Compensation Act to **cover the industry as a whole**" (p. 46). He insisted on including seamen under the Act.

Mr. Frank A. Fritz, T. Hogan & Sons, Inc. (a stevedoring contractor). ". . . We are in **entire sympathy with the principle** underlying the desire to compensate longshoremen."

Probably the most illuminating comments about the coverage of the act were these remarks by Cletus Keating who did not consider the phrase "on a place within the admiralty jurisdiction" adequate to accomplish the intended task of full coverage. He cautioned that "Admiralty jurisdiction" referred to the powers of the admiralty courts and included the high seas. Only injuries on United States waters or United States ships should be covered, but he said:

"I think that coverage ought to be very carefully considered from the standpoint of jurisdiction. **We want to be sure everybody gets in under those words. And I am not sure that they do**" (p. 101).

Throughout the discussions there were references to the act as "**humanitarian legislation**" and to its being motivated by a desire to achieve "**social justice** between employer and employee."

The isolated excerpt from Senate Report 973, p. 16, relied on by Petitioners and Amicus does not show an intent to exclude pier-side injuries. It says only that coverage applies to injuries occurring between the wharf and the ship



"so as to bring them within the maritime jurisdiction." Significantly, the Report does not refer to "on the ship or gangway" but to "between the wharf and the ship." In the light of the testimony that longshoremen work constantly between the wharf and the ship, it seems obvious that exclusion of part of that work was not intended. (See *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 208, 1917.)

It is submitted, a judicious consideration of all the elements compels the conclusion the language ultimately adopted covers all maritime employment injuries irrespective of whether the particular injury occurred on a deck upon navigable waters or on a dock upon navigable waters. This Court reached that salutary interpretation in *Calbeck* — an interpretation thoroughly justified by earlier decisions and the legislative history of this beneficent act.

### III.

#### **This Court has swept aside earlier uncertainties concerning the broad scope of the Act.**

*Calbeck* has established as the criterion of jurisdiction—**If the claim is cognizable in Admiralty the Act applies.** The kernel of the holding of this landmark decision is contained in these two sentences:

"In sum, it appears that the Longshoremen's Act was designed to ensure that a compensation remedy existed for **all injuries** sustained by employees on navigable waters and to avoid uncertainty as to the source, state or federal, of that remedy. Section 3(a) should, then, be construed to achieve these purposes" (370 U.S. at 375).

Far more important than the immediate holding in *Calbeck* — that a workman on a launched but incomplete vessel under construction was covered by the Act, despite earlier holdings to the contrary and the availability of state

benefits — was the Court's scrupulous analysis and explanation of prior decisions and, in particular, its criticism of the interpretation of the Court of Appeals for

"Fixing the boundaries of federal coverage where the outer limits of state competence had been left by the pre-1927 constitutional decisions . . ." (370 U.S. at 375) and for the

"Reading of the line of demarcation as a static one fixed at pre-1927 constitutional decisions" (376).

The last excerpt we shall quote from this forward-looking decision appear on page 371; it reads:

**"Our conclusion is that Congress invoked its constitutional power so as to provide compensation for all injuries sustained by employees on navigable waters whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law."**

This progressive decision is but a recent application of the general rule of liberal interpretation. Compensation Acts, having a beneficent purpose, are not to be confined by prior common law or admiralty decisions restrictively construing their terms. *O'Leary v. Brown-Pacific-Maxon*, 240 U.S. 504, 506, 1951.

In this historic decision, the Court indicated its impatience with previous restrictive holdings based upon whether the man was injured while performing construction work on a vessel still in the process of being built, or doing work on a previously completed vessel undergoing repairs. Rather than encourage artificial "twilight zone" distinctions which might whittle away the rights of injured workman through the process of erosion, the court straightforwardly applied a liberal construction of the Act in order to carry out the protective policy of the law.

With consummate good sense it was pointed out that shipyard workers are subject to assignments on old "repairs", as well as new "construction"; that sometimes they work on vessels in drydock, and at other times on ships afloat in the water; and it is purely a matter of chance whether the workman is injured while assigned to one job, rather than another. This Court considered the philosophy and philanthropic purpose of the Act and experienced no qualms in "for all intents and purposes, writing out of the Act" (to paraphrase slightly Judge Palmieri in *Michigan Mutual Liability Co. v. Arrien*, 233 F. Supp. 496, 500 (S.D. N.Y. 1964)) the words "if recovery . . . may not validly be provided by State law."

Particularly illuminating is this admission which appears on pages 1 and 2 of the unsuccessful Petition for Rehearing for a Writ of Certiorari (October Term, 1964, No. 1017) filed on behalf of the stevedoring company in *Interlake Steamship v. Nielsen*, 338 F. 2d 897 (6 Cir., 1965):

"As the statutory history and *Calbeck v. Travelers Insurance Co.* (1962) 370 U.S. 114, show, the reach of the statute and the reach of Admiralty jurisdiction coincide."

The impact — and controlling effect of *Calbeck* was recognized and approved in *Boston Metals Co. v. O'Hearne*, 1964 A.M.C. 2351 (D.C., Md.), not otherwise reported, which held that the widow of a welder killed on a decommissioned hulk, fast aground and being scrapped, was entitled to benefits under the Act.

In the lucid and convincing words of Judge Winter:

"I think the *Calbeck* case equates, I think the legislative history (of the Longshoremen's Act) supports, and I think the decisions in this Circuit also support the concept that **navigable waters** of the United States means the **admiralty jurisdiction of the United States**, wherever it may be from time to time."

"... I think that the *Calbeck* case makes perfectly plain that the application of the Longshoremen's and Harbor Workers' Act was not to be frozen to the admiralty jurisdiction of the United States as it then existed in 1927 or as it was considered then to exist, but that rather there may be read into the Longshoremen's and Harbor Workers' Act a more flexible concept that under subsequent legislation or, as a result of subsequent Court decisions, the admiralty jurisdiction of the United States is being expanded and the application of the Longshoremen's and Harbor Workers' Act expands along with it."

The award in favor of the dependents of the deceased longshoreman was affirmed on appeal, by a unanimous court, *Boston Metals Co. v. O'Hearne*, 328 F. 2d 504 (4 Cir., 1964), cert. den. 379 U.S. 824.

A case very close on principle and facts is *Michigan Mutual Liab. Co. v. Arrien*, 233 F. Supp. 496 (S.D. N.Y., 1964). The skid on which the longshoreman was injured extended the working surface of the pier. It did not enable passengers, longshoremen or other workmen to go back and forth between the pier and the ship. It was exclusively an extension of the pier, and not of the ship. In no sense was it a gangway or gangplank.

The jurist epitomized the basis for his upholding an award under the Act of a longshoreman injured while working on the skid in this one pregnant sentence:

"It thus appears that 'upon the navigable waters' is to be equated with 'admiralty jurisdiction'" (501).

The opinion also furnishes this very perceptive observation:

"No longer is the Act viewed as merely filling in the interstices around the shore line of the state acts, but rather as an affirmative exercise of admiralty jurisdiction" (233 F. Supp. at 500).

Even the most untutored in maritime law would scarcely argue that a third party claim arising out of the facts upon which these compensation claims are based is not cognizable in admiralty. The facts — failure or malfunctioning of the ship's gear, specifically, the crane — would support a libel in rem, a libel in personam (before the rules change) or a suit on the civil side with counts in unseaworthiness, negligence, and, possibly, statutory violation.

#### IV.

**The term "navigable waters" is one of exceptionally broad scope, and includes the full range of expanded maritime concepts.**

The term "navigable waters" — insofar as federal jurisdiction is concerned — is one of exceptionally broad scope. Probably the clearest definition will be found in Title 16, Section 796 of the United States Code:

"(8) 'navigable waters' means those parts of streams or other bodies of water . . . which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids. . . ."

The national government has been notoriously jealous of its dominion over "navigable waters". Title 33, Section 403, makes it unlawful to build any "wharf, pier . . ." except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army.

In its treatment of "navigable waters" 65 C.J.S. distills an interesting facet of the law on this subject (subparagraph f. page 53):

**"... In other words, the use of a waterway need not be continuous in order to make it navigable in law, and if it is once found to be navigable, it remains so."**

One of the leading cases stressing the breath of the navigability concept is *Economy Light & Power Co. v. United States*, 256 U.S. 113, 65 L. Ed. 847, a 1921 decision authored by Mr. Justice Pitney. Another comparable holding will be found in *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 85 L. Ed. 243 (1941).

As far back as 1875, in *Atlee v. N.W. Union Packet Co.*, 21 Wall, 389-93, 22 L. Ed. 619, this Court held that piers are aids to navigation upon navigable waters, and an unauthorized pier was an unlawful structure.

A recent case that carefully resurveys the area is *Rochester Gas and Electric Corp. v. Federal Power Commission*, 344 F. 2d 594 (2 Cir., 1965). It reiterated that waters are navigable when they are "used or suitable for use" for the transportation of persons or property in interstate or foreign commerce. This includes all interrupting falls, shallows or rapids in said waters. A river, it pointed out, need not be navigable for its entire length, and quoted with approval from the *Appalachian Electric* case:

**"When once found to be navigable, a waterway remains so" (596).**

It synthesized the test of navigability and its present day application in this paragraph on page 596:

**"Accordingly, we hold that the Genesee River is 'navigable waters' from Rochester to Mount Morris, if**

- (1) it presently is being used or is suitable for use, or**
- (2) it has been used or was suitable for use in the past, or**
- (3) it could be made suitable for use in the future by reasonable improvements."**

When an injury occurs over navigable waters, it is submitted the relevant inquiry is not whether the injury occurred upon the ship or its equipment, but whether it occurred over and hence upon navigable waters.

It is fascinating to note that "navigable waters" have been constantly flowing inland. American admiralty and maritime jurisdiction may be traced back to the 1391 English Parliament definition of "A thing done upon the sea." (13 Rich. II c. 5 (1389) and 15 Rich. II c. 3 (1391).) To come down to the last century, this Court initially adopted the "ebb and flow" test of England where "tidal" was synonymous with "navigable". (*The Thomas Jefferson*, 10 Wheat. 428 (1825).)

This "ebb and flow" standard was rejected in *The Propeller Genesee Chief*, 53 U.S. (12 How.) 443, 13 L. Ed. 1059 (1851), which extended admiralty jurisdiction to Lake Ontario and the other Great Lakes. The jurisdiction went further inland in *The Daniel Ball*, 10 Wall. 557, 77 U.S. 557, 10 L. Ed. 999 (1871), which made it applicable to the Grande River and other inland rivers. Coming down to current times, in *Davis v. U. S.*, 185 F. 2d 938 (9 Cir., 1950), (a criminal action involving the negligent operation of a motor boat in violation of Section 526 (1) of the Motor Boat Act of 1940) Federal jurisdiction was recognized as embracing a completely landlocked body of water — Lake Tahoe — located on the California-Nevada border, with no connection with the sea or any tributary thereof.

The zealouslyness of the courts in guarding the nation's rights in navigable waters and related matters is evidence from their constant insistence of the recognition of the "public property of the nation" and the "dominant servitude" in favor of the government.

On February 1, 1926, shortly before committees of the House and of the Senate were searching for the magic formula to cover all longshoremen and ship fitters and finally came up with "upon the navigable waters of the United States", this Court handed down its opinion in the case of *United States v. Holt State Bank*, 270 U.S. 49. On page 56, the Court ruled that navigability by small craft on the drought affected, sand-barred Mud Lake in Minnesota was sufficient to make the body of water navigable. Petitioners are erroneously trying to restrict navigability to waters capable of supporting large, perhaps ocean going vessels. Professor Robinson knew better and in his "Admiralty" (1939) taught us that even a light canoe is a vessel, the floating of which is adequate for navigability (pp. 34, 37-41). See also his earlier remark in "*Personal Injury in the Maritime Industry*," 44 Harvard L. Rev. 223, 230, fn. 21, that "both wharves and ships are on the water."

Petitioners also argue that the erection of the man-made pier at Sparrows Point, Maryland permanently removed from navigation the waters beneath it. Just as the size of the vessel does not determine the navigability of the waters that bear it, neither does the presence or absence of a man-made structure determine navigability in law. One would hesitate to contend that a riparian owner could dispossess the federal government of its jealously guarded navigable waters and its admiralty jurisdiction by the simple, but rash expedient of sinking some pilings and erecting a pier. (See the 1875 case of *Atlee v. N. W. Union Packet Co.*, 21 Wall. 389.)



## V.

**The Johnson and Klosek cases have an additional Admiralty nexus in that the offending instrumentality was a shipboard crane.**

- a. ADMIRALTY IS A LIVING, VIBRANT FORCE; IT IS NOT NOW AND NEVER HAS BEEN STATIC OR STAGNANT. INDICATIVE OF ITS ABILITY TO GROW AND OF ITS ADAPTABILITY AND FLEXIBILITY ARE THE FOLLOWING:

1. *The Seaworthiness Doctrine has gone ashore.*

In *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206, 10 L. Ed. 2d 297 (1963), the Court of Appeals had denied an award to a longshoreman for a dockside injury sustained several hundred feet from the ship's side. This Court rejected the shipowner's restrictive contentions and awarded recovery to the longshoreman injured on the pier, declaring, 209, 210:

"Respondent contends that it is not liable, at least in admiralty, because the impact of its alleged lack of care or unseaworthiness was felt on the pier rather than aboard ship. Whatever validity this proposition may have had until 1948, the passage of the Extension of Admiralty Jurisdiction Act, 62 Stat. 496, 46 U.S.C. 740, swept it away when it made vessels on navigable waters liable for damage or injury 'notwithstanding that such damage or injury be done or consummated on land'."

(See also *O'Donnell v. Great Lakes Co.*, and *Hopson v. Texaco*, *supra*, p. 6).

2. *The Death on the High Seas Act has gone aloft.*

An intriguing case on principle is *D'Aleman v. Pan American World Airways*, 259 F. 2d 493 (2 Cir., 1958). Although the widow of the decedent did not recover because of a failure of proof, the Court held the Federal Death on the

High Seas Act (1920) applicable to a situation where an airplane passenger became terrified because of engine trouble, went into shock and died four days later. In support of its holding, the court asserted, 495:

"The statutory expression '**on the high seas**' should be capable of expansion to **under**, or **over**, as scientific advances change the methods of travel. The law would indeed be static if a passenger on a ship were protected by the Act and another passenger in the identical location 3,000 feet above in a plane were not."

Continuing, it explained its philosophy thus:

"To give to **passengers on ships protection** of the Act and **deny** similar rights to the **passengers in the air** would amount to **unjustifiable** and highly technical **discrimination**."

### 3. *The Jones Act has gone underwater.*

Admiralty law and a seaman's remedies were held applicable to a diver who was injured by being surfaced too rapidly while repairing an off-shore oil well drilling rig in *Smith v. Brown & Root Marine Operators, Inc.*, 243 F. Supp. 130 (W.D. La., 1965), aff., per curiam, 376 F. 2d 832 (5 Cir., 1967).

### 4. *The appurtenances of a ship are extending further shoreward.*

In the immigration case of *United States v. Yee Nee How*, 105 F. Supp. 517 (S.D. Cal., 1952) a pier was held to be an extension of the vessel. In *Spann v. Lauritzen*, 344 F. 2d 204 (3 Cir., 1965) the court was dealing with discharging mechanisms far removed from traditional "ship's gear" and located not on the vessel but on the pier. Despite the modernity and locality of the equipment, it was held covered by the seaworthiness doctrine and the longshoreman injured by its malfunction entitled to recover in a third

party action. See also *Nicholson v. Aurora Shipping Co.*, 278 F. Supp. 272, 273 (S.D. Tex., 1966).

b. THE ADMIRALTY EXTENSION ACT HAS BROADENED  
ADMIRALTY JURISDICTION.

One of the leading cases in this field is *Gutierrez*, cited in subparagraph a. 1 of this point V. The language of the Admiralty Extension Act is simple and direct. Henceforth, the admiralty and maritime jurisdiction

"shall extend to and include **all cases** of damage or injury, to person or property, **caused by a vessel** on navigable water, notwithstanding that such damage or injury be done or consummated on land."

This extension to "**all cases**" certainly covers remedies of all types and **includes claims under the Longshoremen's Act** no less than actions at law and libels in admiralty (prior to consolidation of the rules). The expression "**caused by a vessel**" just as clearly covers injuries caused by **appurtenances of the vessel** even though consummated dockside.

After its enactment, the Admiralty Extension Act, 1948 (46 U.S.C. 740) was promptly recognized as being no more than declaratory of the ancient traditions respecting the extent of admiralty jurisdiction. *Strika v. Netherlands Ministry*, 185 F. 2d 555, 558, 2nd Cir., 1950, cert. den. 341 U.S. 904; *United States v. Matson Nav. Co.*, 201 F. 2d 610, 614, 9th Cir., 1953; *Diamond State Tel. Co. v. Atlantic Refining Co.*, 205 F. 2d 402, 3rd Cir., 1953; *American Bridge Co. v. The Gloria O.*, 98 F. Supp. 71, E.D. N.Y., 1951; *Fematt v. City of Los Angeles*, 196 F. Supp. 89, S.D. Calif., 1961.

Judge Edwards of the Court of Appeals for the Sixth Circuit in *Interlake Steamship v. Nielsen*, 338 F. 2d 879 (1965) summarized the present posture of the law thus:

"It seems obvious to us that the trend of case law, the impact of the Admiralty Extension Act, and the effect

of *Calbeck* have all pointed in the direction of **expanding the boundaries of admiralty jurisdiction toward land**" (338 F. 2d at 882).

## VI.

**In addition to being factually upon navigable waters, piers are their indispensable adjuncts.**

The facts of this case are not challenged. In the words of the Solicitor General "The relevant facts . . . are not in dispute . . ." (p. 4). Included in the undisputed verities is the fact the piers involved in the controversy are "upon navigable waters". In the Johnson-Klosek cases there is such an admission in the pleadings. The averment in the Complaint for Review in pertinent part reads:

" . . . the Complainant (Deceased in Klosek case) was working as a longshoreman on the six hundred foot Bethlehem Steel High Pier located upon navigable waters . . . (Paragraph 2 of each Complaint for Review)

Paragraph 2 of the Answer read:

"Second: This respondent **admits** the matters and facts alleged in the Second Article of the complaint" (Paragraph 2 of Nacirema Answer).

In the *Avery* case there is an express stipulation to that effect (App. 9). In the orders rejecting the claims in the Johnson and Klosek cases, Deputy Commissioner Traynor held as a fact the "**surface of the pier is situated over the navigable waters . . .**" (App. pp. 4 and 7, respectively). This, it is submitted, is dispositive of the cases. (See treatment in opinion below, pages 55 and 56 of the Appendix, including footnote 15.) If further discussion is desired, the following observations may be deemed relevant.

The Sparrows Point High Pier was not of the solid, filled-in type; it was perched stilt-like on pilings with the waters flowing freely beneath the decking. It did not divert, block

or replace the navigable waters. It is interesting to note that small boats often navigate the water beneath such piers built on, over and upon navigable waters, to inspect for excessive oil deposits and other fire hazards. There can hardly be any doubt that injuries sustained under the pier in small boats engaged in such activity would be compensable under the Longshoremen's Act.

From a historical standpoint, it may be observed contending pier injuries are excluded from admiralty jurisdiction is highly questionable. As far back as the 17th century, admiralty jurisdiction extended to all employments, maritime in fact, and to all injuries and damages sustained on piers and wharves located on navigable waters. This rule of coverage was developed from the "Ordonnance de la Marine" of Louis XIV (Liv. I, Tit. II, Articles 1, 3, 6 and 7) which gave the Admiralty exclusive jurisdiction of all shipbuilding employment and of all damages done on or to banks, wharves, moles, jettys, and similar works. (For the original French text, see Dunlap, Admiralty Practice (1836) pp. 2-4; second edition, 1850, pp. 26, 27.) Because of restrictive judicial decisions, the Royal Declaration of 1694 expressly confirmed that the exclusive admiralty jurisdiction included not only all damage and injury done by or to vessels but also all cases which occur upon the beaches and quays as well. See text in 1 Valin, *Commentary*, p. 135.

As Deputy Commissioner C. D. Calbeck stated in finding No. 9 in the Nicholson Case, the dock was a "means or connecting link in furnishing *ingress and egress from the said vessel*." So, in the related unseaworthiness case, Judge Noel held the wharf where the injury occurred was upon the "navigable waters of the United States". *Nicholson v. Aurora Shipping Co.*, 278 F. Supp. 272, 273 (S.D. Tex., 1966). The exclusive maritime nature of a pier is evident

from this 1883 definition culled from *Langdon v. City of New York*, 93 N.Y. 129, 151:

**"A wharf is a structure on the margin of navigable waters, alongside of which vessels can be brought for the sake of being conveniently loaded or unloaded. Hence, waters of sufficient depth to float vessels is an essential part of every wharf. A wharf cannot be defined or conceived except in connection with adjacent navigable waters."**

Comparable restatements will be found in 68 C. J., *Wharves*, Section 1, p. 203, and its more modern counterpart, 94 C.J.S., *Wharves*, Section 1, p. 567. See also 56 Am. Jur., *Wharves*, Section 2, pp. 1064, 1065.

A pier's "raison d'être" is to facilitate the loading or discharging of a vessel; were it not for water commerce, there would be no piers. Logically, and functionally they are but over-sized gangways — an extension of the ship and not of the land. It is urged that the legal fiction a pier is an extension of the land was created to assist state power; it is nonetheless historically erroneous and factually illogical.

That piers are permanent structures which destroy the previous navigability of the waters over which they perch — a contention advanced by Petitioners — is an even greater fallacy. To determine the "permanency" of some of the pier structures, all one has to do is take a stroll along the shores of any seaport and note the rotting, deteriorating condition of so many of the docks. The Port of Baltimore is engaged in a modernization program during which some piers are being torn down and rebuilt and others abandoned. A recent (February, 1969) item on the maritime page of a Baltimore daily mentioned that 271 delapidated piers in the Port of New York were to be torn down.

To sum up this facet of our argument — if a pier is not deemed an “extension of the ship” or “upon navigable waters”, it is far more an adjunct of “navigable waters” than is an inland marine railway to a drydock, and injuries thereon should be equally covered.

## VII.

### **Response to arguments contained in Briefs of Petitioners and Amicus.**

#### **A. NACIREMA OPERATING CO., INC. AND LIBERTY MUTUAL INSURANCE COMPANY.**

Points I and IA have already been answered, *supra*.

Point II has already been answered, *supra*.

Point III has already been answered, *supra*.

Point IV. This argument is basically a paraphrase of the complaint voiced by the Respondents in *Gutierrez* that claims arising out of faulty cargo containers in Denver and other far inland sections of the country would be flooding our admiralty courts. These dire forebodings have proved totally unfounded. Similarly, no rash of cases for land injuries were filed under the Longshoremen's and Harbor Workers' Compensation Act in the wake of this Court's decision in *Avondale Marine Ways, Inc. v. Henderson*, 346 U.S. 366, 1953. When injured, the shoreside mechanics working in the sheds didn't rush in to file claims under the Harbor Workers' Act. To get down to the instant cases, counsel for Respondents telephoned the Deputy Commissioner of the Court Compensation District (Baltimore, Maryland) to inquire whether any pier related cases had been filed in his office subsequent to the release of the Court of Appeals' opinion in these suits; he stated he knew of none.

If the Petitioners are insisting on a geographic boundary, it is suggested the water's edge is far more logical, functional and natural than that of an artificially created pier. (See, for interpretation of Submerged Lands Act of 1953, 43 U.S.C. 1301-1315, *United States v. Louisiana*, 389 U.S. 155 (1967).)

#### B. DEPUTY COMMISSIONERS.

Point I has already been answered, *supra*.

Point II has already been answered, *supra*.

Point III has already been answered, *supra*.

#### C. AMICUS.

The Brief of Amicus is notable for its predictions of horrendous results and unrestrained language. Illustrations of the latter are **"incredible and shocking conclusion"** (p. 8) and **"twisted and distorted . . . beyond all rhyme or reason"** (p. 11). See, also, pages 10 and 13.

The Brief contains various restatements of the one dominant theme of amicus. The arguments contained in the different subdivisions have been answered either in this Point VII or elsewhere in Respondents' Brief. A few additional remarks are in order. We challenge the correctness of the statement "Before the employer can safely start the payment of compensation benefits under these circumstances, under the Fourth Circuit 'status test', the employee's 'status' must first be ascertained or determined" (p. 20). This has not held true in the instant Klosek case; the carrier promptly started making payments in accordance with the lower Maryland schedule. This, it is submitted, is what will happen in every case in which there was a legitimate doubt concerning which act applies — the insurance company will start paying in accordance with the lower state schedule.



Our final comment is that no change in the language used by Congress is required. In adopting the final draft of the law, Congress, after much soul searching, incorporated therein the language most calculated to cover the beneficiaries of the law. The legislators could not come up with a better phrase than "upon the navigable waters of the United States." No protective law can be drafted with such precision that interpretation is rendered unnecessary. Any terminology written into the Act would be subject to the same criticism and concern expressed by Amicus in its Brief.

### CONCLUSION

The Petitioners and their Amicus are importuning this Court to repudiate its own guide lines that the Act must not be applied to bring about "harsh and incongruous" results and to interpret the remedial statute as countenancing

- a. the granting of benefits to a longshoreman injured on the vessel by a malfunctioning of the ship's gear and their denial to a longshoreman injured a few feet away on the pier by a malfunctioning of the same gear;
- b. the granting of benefits to a longshoreman working on the pier who is struck and knocked sideways into the water and their denial to a longshoreman working alongside who is only knocked to the edge of the pier;
- c. the granting of benefits to a longshoreman working on the pier who is lifted up and dropped back down on the pier, and their denial to his partner whose misfortune is to be knocked horizontally instead of being lifted vertically.

It taxes one's credulity to believe that Congress intended any such anomalies or bizarre results.

Although in planning the Act Congress may have started with a limited-objective, the more it analyzed and studied the problem, the more it realized the necessity of enacting a law that was far more embrative. From the several hundred pages of the Hearings, Reports and Debates, those arguing for a restricted and constricted application of the Act's beneficial purposes can find solace in but a single sentence culled from an unsigned reported prepared by an unidentified aide during the early stages of the Congressional investigation (three months after the hearings started and nine months before the bill was approved) and based on a draft of the statute substantially different from the wording finally adopted.

If one thing stands out preeminently in the legislative history, it is a Congressional resolve to avoid the constitutional pitfall of lack of uniformity which caused Congress to stumble in its two earlier attempts to help longshoremen. The preoccupation of the Chairman with uniformity, and his apprehensiveness over its possible vitiating absence (the exclusion of seamen), are apparent throughout all the proceedings.

With respect to the uniformity of full coverage, there was unanimous accord. The Committees and both Houses wanted to avoid any constitutional flaw in the law; labor, both the ILA and the shipyard unions, wanted full coverage; management supported it; the government agency entrusted with the administration of the Act wanted all facets of the "job" covered. To contentiously argue that the pier-side complement of 25% of the longshoreman work force is not protected by the Act is striving to defeat the very uniformity so earnestly sought — and actually achieved. Congress certainly did not design the Act to be a cruel

hoax, subjecting longshoremen members of the same gang to a pendulum type of justice swinging back and forth between state and federal jurisdiction as they performed their duties alternately aboard ship and on the pier alongside.

The legislators labored arduously to obtain the proper terminology. The formula of jurisdictional coverage ultimately chosen was "upon the navigable waters of the United States", and not the restrictive "upon a ship," "immersion in the water" or any other comparable warped or jaundiced interpretation that may be contended for by Petitioners.

In the instant case, the totality of the facts took place upon the navigable waters of the United States — in part on the deck of a pier and in part on the deck of a ship — but at all times upon the navigable waters of the Patapsco River. There is nothing in the Act to exclude any injuries which are found to occur in fact "upon the navigable waters of the United States" nor to distinguish between those on a ship "upon navigable waters" and those on a pier "upon navigable waters."

Had Mr. Justice Brown returned and sat with this Court in passing on the seamen's seaworthiness claim in *Waldron v. Moore-McCormack Lines, Inc.*, 386 U.S. 724 (1967) he would scarcely have recognized the vigorous doctrine he sired in his 1903 *Osceola* decision. In 1946, Mr. Justice Rutledge presided over the birth of the longshoreman's seaworthiness doctrine in *Sieracki*; it, too, has now come of age and is a powerful force for good. (Witness *Mascuilli v. United States*, 387 U.S. 237 (1967).)

It may come as a shock to Petitioners who are so patently enamored of some pre-1927 views, but one cannot thrust

the mighty 42 year old oak of the Act back into its embryonic acorn. Both the seaworthiness doctrine and the Act are traceable to a common origin — solicitude for maritime workers who spend their lives in such a perilous calling. Just as the seaworthiness doctrine has grown, developed and expanded down through the years, so, too, must the Act.

Reduced to its simplest terms, the argument of Petitioners is that if the injury occurred on a deck on navigable waters, the Act applies; if on a dock on navigable waters, it does not apply. Such linguistic sophistry does violence to (a) the legislative history; (b) the protective purpose of the Act; (c) the long established principles of interpretation of remedial statutes; (d) the phenomenal growth of admiralty concepts in the more than 40 years since the passage of the Act; (e) the expansive influence of the Extension of Admiralty Act, and (f) the controlling authority of recent decisions of this Court.

It is urged that a liberal interpretation of this liberal Act, especially in the light of the beneficent maritime philosophy of *Sieracki* and the mandates of *Calbeck*, *Gutierrez and Reed*, leads unerringly to the conclusion that the death and injuries sustained in the instant cases are compensable. As one commentator succinctly expressed it — longshoremen claims must henceforth remain “at the beck and call of *Calbeck*.”

This Court has been wont to stress that American Jurisprudence is motivated by “Fair Play”. The fundamental issue in this litigation is this — under all the circumstances, is the position contended for by Petitioners fair and equitable, or is it “harsh and uncongruous”? Because its harshness and incongruity borders on the unconscionable, because it is unfair and inequitable, it must be rejected.

For the reasons developed in this Brief and synopsized in this Conclusion, it is urged that the decision of the Court of Appeals below be affirmed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that copies of the foregoing Brief were served on the following attorneys for all parties herein by mailing them, postage prepaid, on this 10th day of March, 1969:

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Nos. 9 and 16

MR. F. DAVIS, CL.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

MACIREMA OPERATING CO., INC. AND LIBERTY  
MUTUAL INSURANCE COMPANY, PETITIONERS

v.

WILLIAM H. JOHNSON, JULIA T. KLOSEK AND  
ALBERT AVERY

JOHN P. TRAYNOR AND JERRY C. OOSTING, DEPUTY  
COMMISSIONERS, PETITIONERS

v.

WILLIAM H. JOHNSON, JULIA T. KLOSEK AND  
ALBERT AVERY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT AVERY

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## BRIEF FOR RESPONDENT AVERY

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### OPINIONS BELOW

The opinions below are adequately set forth in Petitioners' Briefs, except that the Deputy Commissioners' Brief inaccurately states that the District Court opinion in Avery is not reported. In fact, it is found at 245 F.Supp. 51 (E.D.Va. 1965).

### JURISDICTION

The jurisdictional requisites are adequately set forth in Petitioner's Brief.

### STATUTES INVOLVED

The statutes involved are set forth in the Deputy Commissioners' Brief.

### QUESTIONS PRESENTED

Did not Congress, whose dominant purpose was to help longshoremen, intend the Longshoremen's Compensation Act to cover injuries caused by ship's gear to

a longshoreman in the ship's gang working the ship from a pier built in and upon freely flowing navigable waters?

#### STATEMENT OF THE CASE

Albert Avery was a member of the International Longshoremen's Association, Norfolk Local 1248. As is the custom, on December 28, 1961, Albert Avery "shaped up" and was hired at his I.L.A. hiring hall as a member of the ship's gang of longshoremen. The gang met aboard the ship shortly before 8:00 A.M., and the boss then decided who would work aboard the ship, and which two gangmembers would be "slingers" on the dock. (App. 45) Whether a man worked aboard the ship, or was given a "slinger" job (attaching the ship's gear to or from the cargo), was completely dependent upon orders given on that particular day. (App. 45) It is not unusual for a "slinger" to change places with a "holdman" during the day. (App. 45). Whether a member of a ship's gang of longshoremen worked in the service of the ship from the dock, or on the ship, ultimately depended on his employer's orders.

Huge heavy logs were being loaded into a deep draft cargo ship docked beside Pier B at the Port of Norfolk on December 28, 1961. (App. 8) Pier B is erected stilt-like upon wooden pilings sunk in the bed of the Elizabeth River. Freely flowing navigable tidal waters rise and fall beneath the pier. Small boats and barges navigate under the pier. (App. 45)

Pier B juts out approximately 1200 feet into the Elizabeth River, which flows beneath the pier, and two deep draft cargo ships can berth at either side of the pier. (App. 7-8) It was stipulated that the pier extended into and over navigable waters. (App. 9, 45)

Albert Avery, a member of the ship's gang assigned to the dock as a "slinger", was in a railroad car attaching the ship's cargo runners and gear to the heavy logs so that they could be lifted aboard the ship by means of the ship's winches and placed in a ship's hatch. (App. 8, 45) While a load of these logs was being lifted by the ship's winches, the logs and attached ship's cables were swung by the ship's winches against Avery, crushing him, (App. 8, 45)

thereby causing him severe, permanent injuries which have not allowed him to continue the work of a longshoreman.

Judge Sobeloff held as follows in the en banc opinion, concurred in by five Judges of the Court of Appeals for the Fourth Circuit (App. 48-56):

"Beyond question, Congress could constitutionally ground jurisdiction on the function or status of the employees, as the Labor Department urged, and thus extend coverage to all longshoremen injured during the loading, unloading, repairing or refitting of vessels regardless of the situs of the injury. . . . The question, therefore, is whether Congress fully exercised this power, as the injured longshoremen contend, or whether it incorporated in the revised bill the phrase "upon the navigable waters" specifically to freeze coverage to injuries occurring within the admiralty tort jurisdiction as it was thought to exist in 1927, as the stevedoring and insurance companies insist. . . . we find substantial support for the conclusion that Congress designed the Act to be status oriented, reaching all injuries sustained by longshoremen in the course of their employment.

x x x

Prolonged discussion of this issue is now unnecessary, however, since it has been authoritatively resolved by the Supreme Court in *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114 (1962). Quoting with approval the Fifth Circuit in *Debardelen*

Coal Corp. v. Henderson, 142 F.2d 481 (1944), the Court stated:

'The elaborate provisions of the Act, reviewed in light of prior Congressional legislation as interpreted by the Supreme Court, leaves no room for doubt, as it appears to us, that Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject matter.\* \* \*It is sufficient to say that Congress intended the compensation act to have a coverage co-extensive with the limits of its authority.' 370 U.S. at 130. (Emphasis added.)

X X X

This affirmative exercise of the admiralty power of Congress "to the fullest extent" of its jurisdiction, creating "a coverage co-extensive with the limits of its authority," can only mean that Congress effectively enacted a law to protect all who could constitutionally be brought within the ambit of its maritime authority.

X X X

This interpretation of the Act, giving the injured longshoreman the broadest protection, not only fully complies with the mandate of the Supreme Court in *Voris v. Eikel*, 346 U.S. 328, 333 (1953) that the Act be liberally construed, but also comports with the Court's observation in *Calbeck*, supra at 123, that the Act should be read to avoid the "uncertainty, expense, and delay of fighting out in



litigation" the proper source of compensation, state or federal.

x x x

An alternative route, advocated by some courts, would also extend coverage under the Act. Concluding that Congress had exercised the more limited tort jurisdiction. . . They reasoned, in light of Calbeck that the phrase "upon navigable waters" in this remedial legislation was not limited to the tort jurisdiction as it was thought to have existed in 1927, but must be construed to include the full range of the legislatively and judicially expanded concept of maritime jurisdiction.

x x x

. . . In *Reed v. Yaka*, 373 U.S. 410, 415 (1963), the Court reiterated its earlier mandate that "the Longshoremen's Act 'must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.'"<sup>12</sup> This direction was then amplified by the explanation that "[i]t would produce a harsh and incongruous result, one out of keeping with the dominant intent of Congress to help longshoremen, to distinguish between liability to longshoremen injured under precisely the same circumstances\* \* \*. [Those] subject to the same danger\* \* \* [are] entitled to like treatment under law."

x x x

. . . First, as noted above, the injured longshoremen were members of a gang all of whom did basically the same work

for the same pay and were subjected to the same risks, passing freely from ship to pier in the course of their work. All would concede that a longshoreman crushed by a rotating draft while working in a ship's hold would be entitled to recover under the Act. It would be intolerably harsh and incongruous to deny the same benefits to a longshoreman injured while performing the same task on an adjoining pier.

X X X

. . .the Act would further extend to a longshoreman injured in the waters immediately beneath the pier regardless of how he got there; but not, the stevedores here contend, to injuries sustained by maritime workers performing traditional maritime tasks, injured on a pier above the water.

X X X

A third incongruity, that would be frozen into law if the contentions of the stevedores were to prevail, is apparent from broad liberal construction that has been applied to the term "dry dock," . . . compared with the very narrow interpretation they would attach to the phrase "upon navigable waters." We perceive no rational justification for this diverse treatment.

Finally, the parties have stipulated that small vessels are able to navigate beneath the piers on which the accidents in the instant cases took place. These waters are therefore navigable in fact. Since the jurisdictional scope of the phrase "upon navigable waters" extends to injuries occurring "above" such waters,

we are compelled to conclude that the injuries suffered by Vann, Johnson, Klosek and Avery were all sustained upon the navigable waters of the United States."

#### SUMMARY OF ARGUMENT

The Act covers all injuries to longshoremen with in Congress's constitutional power to legislate about the subject. That any such injury might also be compensable under a State compensation act is immaterial. No doubt Congress asserted its full constitutional power via the Act, thus making jurisdiction co-extensive with the limits of its authority. Moreover, the Act itself, 33 U.S.C. Sec. 920, presumes jurisdiction unless there be "substantial evidence to the contrary."

Even if we assume Congress grounded the Act only upon Admiralty tort jurisdiction, there is no doubt that Admiralty tort jurisdiction obtains under the facts herein. The Act's jurisdictional phrase "upon the navigable waters", is thus equated with admiralty tort jurisdiction. Of course the Calbeck case rejected freezing the Act to the concept of Admiralty tort cognizance as it was merely understood in 1927.

The waters beneath the pier involved herein are navigable in fact, and used for maritime commerce.

There is no doubt that the intent of Congress in passing the Longshore Act was to help longshoremen. It would be a harsh and incongruous result to deny longshoreman Avery herein the benefits of the Act, when he faces the same risks, and does the same work, as his fellow gangmembers aboard ship.

The Act is denominated 'An act to provide compensation for disability or death resulting from injuries to employees in certain maritime employment.' Clearly, nothing in the legislative history of the Act shows anything but Congressional interest in covering workers in maritime employment injured as longshoreman Avery herein.

The Court in Calbeck holds that there are areas of overlapping State and Federal coverage, and refuses to construe coverage under the Federal Act as mutually exclusive State-Federal; rather Calbeck equates Federal coverage with "...the limits of maritime jurisdiction." Calbeck v. Travelers Insur. Co., 370 U.S. 114, 125 (1961). Calbeck recognizes

Congress's intention in the Act to compensate longshoremen up to the limits of Congress's constitutional power.

#### ARGUMENT

I. Congress Asserted Its Full Constitutional Power Via The Act, Thus Making Jurisdiction Co-extensive With The Limits Of Its Authority.

This Court in *Calbeck v. Travelers Insurance Co.* 370 U.S. 114, 117 (1962), stated as follows: "Our conclusion is that Congress invoked its constitutional power so as to provide compensation for all injuries sustained by employees on navigable waters whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law. . . ." The *Calbeck* Court went on to say at 370 U.S. 114, 124, 126-127: "In sum, it appears that the Longshoremen's Act was designed to ensure that a compensation remedy exist for all injuries sustained by employees on navigable waters, and to avoid uncertainty as to the source, state or federal, of that remedy. Section 3(a) should, then, be construed to achieve these

purposes. . . . Congress brought under the coverage of the Act all such injuries whether or not a particular one was also within the constitutional reach of a state workmen's compensation law. . . ." Finally, the Court in *Calbeck*, held at 370 U.S. 114, 130: "The elaborate provisions of the Act, viewed in the light of prior Congressional legislation as interpreted by the Supreme Court, leaves no room for doubt, as it appears to us, that Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject-matter. . . . It is sufficient to say that Congress intended the compensation act to have a coverage co-extensive with the limits of its authority and that the provision 'if recovery. . . may not validly be provided by State law' was placed in the Act not as a relinquishment of any part of the field which Congress could validly occupy but only to save the act from judicial condemnation, by making it clear that it did not intend to legislate beyond its constitutional powers. . . . In the application of the Act, therefore, the broadest ground it permits of should be taken."

In *Interlake S. S. Co., v. Nielson*, 338 F.2d 879, 883 (6th Cir. 1964), cert. denied, 381 U.S. 934, the Court observed:

"If Calbeck holds (and we think it does) 'that Congress intended the compensation act to have a coverage co-extensive with the limits of its authority,' then there can be no doubt about the outcome of this appeal."

In *Boston Metals Co. v. O'Hearne*, 329 F.2d 504, 507 (4th Cir. 1964), cert. denied, 379 U.S. 824, when injury occurred on a dead hulk being cut up for scrap on a beach, the Court held that jurisdiction obtained under the Act, and noted, ". . . Calbeck is controlling in this case." The Court affirmed Judge Winter's decision which cogently found as follows at 1964 A.M.C. 2351 (D. Md. 1963):

I think the Calbeck case equates, I think the legislative history [of the Longshoremen's Act] supports, and I think the decisions in this Circuit also support the concept that navigable waters of the United States means the admiralty jurisdiction of the United States, wherever it may be from time to time.

As with *O'Donnell v. Great Lakes Co.*, 318 U.S. 36 (1943), where the Court earlier recognized that

both ships and docks are on the water and held the Jones Act to apply equally to dockside injuries in maritime employment as well as to those aboard, there is no reason for not carrying out the congressional intention that the benefit of federal legislation for maritime workers should be granted to the fullest extent of congressional power by giving a consistent reading to the words Congress employed. In O'Donnell, supra, this Court used almost the identical language in directing a broad reading of the Jones Act as the language used in Calbeck, brief herein at pp. 10-11, directing a broad reading of the Longshoremen's Act (O'Donnell at p. 39):

Congress, in the absence of any indication of a different purpose, must be taken to have intended to make them applicable so far as the words and the Constitution permit, and to have given to them the full support of all the constitutional power it possessed. Hence, the Act allows the recovery sought unless the Constitution forbids it.

Much earlier than the Court's controlling decision in Calbeck, supra, Davis v. Dept. of Labor, 317 U.S. 249, 256 (1952) articulated: ". . . 33 U.S.C. Section 920, which provides that in proceedings under the Act, jurisdiction is to be 'presumed in



the absence of substantial evidence to the contrary'.  
(Emphasis added)

No doubt Congress asserted its full constitutional power via the Act, thus making jurisdiction co-extensive with the limits of its authority.

II. Even Assuming Arguendo That Congress Asserted Only Admiralty Tort Jurisdiction Via The Act, Jurisdiction Includes The Legislatively And Judicially Expanded Concept of Maritime Tort Jurisdiction.

Discussing the Longshoremen's Act, the Court in *Holland v. Harris Bros.*, 306 F.2d 369, 373 n.4 (5th Cir. 1962) stated: ". . .the history of the Act indicates that its underlying purpose was to embrace the admiralty jurisdiction whatever that might be. See *Parker v. Motor Boat Sales, Inc.*, supra, especially 314 U.S. at 249-50. . ."

It is familiar in third party marine tort cases that being in and upon navigable waters, piers and their equipment, such as hoppers, cranes, etc., used in loading and unloading cargo or by persons going to and from the vessels, are appurtenances within the ordinary conception of vessels on navigable

waters. See, e.g., *Thompson v. Calmar S.S. Corp.*, 331 F.2d 657 (3d Cir. 1964), cert. denied, 379 U.S. 913 (railroad car); *Spann v. Lauritzen*, 344 F.2d 204 (3d Cir. 1965); *Huff v. Matson Navigation Co.*, 338 F.2d 205 (9th Cir. 1964), cert. denied, 380 U.S. 940. Indeed it would be truly strange and inconsistent if the same acts or omissions which gave rise to longshoremen third-party tort claims under federal admiralty jurisdiction were held not to give rise to federal compensation claims. Admiralty jurisdiction obtained for tort claims under facts substantially the same as the instant case even before the passage of the Admiralty Extension Act, 46 U.S.C. 740. See *Strika v. Netherlands Ministry*, 185 F.2d 555 (2d Cir. 1950), cert. denied, 341 U.S. 904. This Court reads the Admiralty Extension Act, 46 U.S.C. Sec. 740 broadly, not restrictively, in *Gutierrez v. Waterman S.S. Corp.* 373 U.S. 206, 209-210 (1963) (beans on dock).

In *Michigan Mutual Liability Co. v. Arrien*, the Court stated as follows at 233 F. Supp. 496, 500, 501, 502 (S.D.N.Y. 1965), aff'd, 344 F.2d 640 (2d

Cir. 1965), cert. denied, 382 U.S. 835:

What is just as important as the actual holding in Calbeck is the general approach to the Act taken by the Court. No longer is the Act viewed as merely filling in the interstices around the shore line of the state acts, but rather as an affirmative exercise of admiralty jurisdiction.

. . . It thus appears that 'upon the navigable waters' is to be equated with 'admiralty jurisdiction.' Giving longshoremen the broadest possible coverage affords added clarity in the law for these men. . .

. . . Needless to say, this Extension Act could be constitutional only if it was within the legislative power of Congress to adopt. . . .

. . . The basis upon which the Extension Act and the Longshoremen's Act rest is the same--the admiralty jurisdiction of the United States; and both Acts must be understood to have expanded pari passu with it. Any departure from this view would compel the conclusion that the Longshoremen's Act was to be frozen to the admiralty jurisdiction of the United States as it was understood at the time of its enactment in 1927, a view rejected by the Supreme Court in the Calbeck case by clear implication.

In *Boston Metals Co. v. O'Hearne*, 1964 A.M.C. 2351, 2352 (D. Md. 1963), aff'd, 329 F.2d 504 (4th Cir. 1964), cert. denied, 379 U.S. 824 (injury was on a beached scrap hulk) Judge Winter stated:

[T]rue, the Admiralty Extension Act was not passed until after the Longshoremen's and Harbor Workers' Compensation Act was passed, but I think that the Calbeck case makes perfectly plain that the application of the Longshoremen's and Harbor Workers' Act was not to be frozen to the admiralty jurisdiction of the United States as it then existed in 1927 or as it was considered then to exist, but that rather there may be read into the Longshoremen's and Harbor Workers' Act a more flexible concept that under subsequent legislation [by the Admiralty Extension Act] or as a result of subsequent Court decisions, the admiralty jurisdiction of the United States is being expanded and the application of the Longshoremen's and Harbor Workers' Act expands along with it.

It is long settled that neither in admiralty nor under the Longshoremen's Act does jurisdiction require that the injury occur on a ship. *Newport News S.B. & D.D. Co. v. O'Hearne*, 192 F.2d 968, 971 (4th Cir. 1951). So, in *D'Aleman v. Pan American World Airways*, 259 F.2d 493, 495 (2d Cir. 1958), the Court held the similar coverage language of the Death on the High Seas Act, 46 U.S.C. 761, "occurring on the high seas" extended to fatal injury by shock on an airplane which like the injury herein, was over and above, the water:

The statutory expression "on the high seas" should be capable of expansion to, under, or over, as scientific advances change the methods of travel. The law would indeed

be static if a passenger on a ship were protected by the Act and another passenger in the identical location three thousand feet above in a plane were not. Nor should the plane have to crash into the sea to bring the death within the Act any more than a ship should have to sink as a prerequisite.

Even assuming arguendo that Congress asserted only tort jurisdiction via the Act, jurisdiction includes the legislatively and judicially expanded concept of maritime tort jurisdiction.

III. Both The Ship, That Caused Injury Herein, The Pier From Which The Ship Was Worked, Were Upon Waters Navigable In Fact.

Pier B rests on pilings and perches above and upon freely flowing navigable waters. The waters beneath pier "B" were stipulated to be navigable in fact, and barges and other small commercial craft and do navigate under the pier. Of course, the pier is in and upon waters navigable in law within Congressional power. In holding that piers in the Elizabeth River in Norfolk, Virginia (the same navigable body which contains pier "B" herein) can be demolished without compensation to the owner via Congress' power over navigable waters, the Court is

Greenleaf - Johnson Co. v. Garrison, 237 U.S. 251, 268 (1914) stated: "The mooring of vessels is as necessary as their movement. . . ." In construing an Act of Congress concerning the same subject as herein, "navigable water of the United States," the Court in Economy Light and Power Co. v. United States, 256 U.S. 113, 118 (1921) stated: "The fact, however, that artificial obstructions exist, capable of being abated by due exercise of the public authority, does not prevent the stream from being regarded as navigable in law, if, supposing them to be abated, it may be navigable in fact in its natural state." It is in no way inconsistent to speak of "injury occurring upon navigable waters, including any drydock" without special mention of docks or piers. It was familiar when the Longshoremen's Act was being drafted in 1926 that most drydocks - shipways and marine railways - are entirely on land and not in any way factual sense "upon navigable waters" as are piers and docks. Obviously, the draftsmen added "any drydock" in order to be certain to include such docks and ways as are in fact a part of dry land and not physically "upon navigable waters." Ordinary docks and piers are

of course automatically included without any special mention because they in fact are "upon navigable waters"-just the same as is a vessel afloat. Congress therefore, had no need to add "including any pier, dock, or drydock" in order to cover injuries on docks and piers, which were already covered because of the factual situation upon navigable waters. Indeed, to prolong the list of specific mentions might have caused a restrictive construction of the meaning of "any drydock" so as to exclude shipways and marine railways, which of course the Courts have held to be under the Act, construing "drydock" broadly and liberally.

Judge Palmieri recognized the above in *Michigan Mutual Liability Co. v. Arrien*, 233 F.Supp. 496, 500 at n.3 (S.D.N.Y. 1964): ". . . Congress obviously expected 'docks' to be covered [by the words 'upon the navigable waters']", but feared that 'drydocks' might be held by the Courts to be without the act, therefore felt it advisable to expressly mention the latter."

Both the ship that caused injury herein, and the pier from which the ship was worked, were upon water.

navigable in fact.

#### IV. Congress' Dominant Intent Was To Help Longshoremen.

The paramount consideration in statutory construction is effectuation of the intent of the legislature. *Helvering v. Stockholms Enskild Bank*, 293 U.S. 84, 88-89 (1934). This Court has consistently held that with the Longshoremen's Act "...the dominant intent of Congress [was] to help longshoremen. . . ." *Reed v. Yaka*, 373 U.S. 410, 415 (1963).

Judge Palmieri reasoned as follows in *Michigan Mutual Liab. Co. v. Arrien*, 233 F.Supp. 496, 504 (S.D. N.Y. 1965), *aff'd*, 344 F.2d 640 (2d Cir. 1965), *cert. denied*, 382 U.S. 835:

It would be incompatible with the dominant intent of Congress to assist longshoremen, to distinguish between longshoremen injured under substantially the same circumstances, and to afford them different standards of relief. If Parisi, the injured longshoreman in this case, had been on the pallet when it broke, instead of just below it, there would be no question of this entitlement to the award. Any of Parisi's co-workers engaged in the same unloading work, but stationed at the ship's winch or at the ship's rail, would have been entitled, in case of injury, to the benefits of the federal statute. It would be anomalous and incongruous to compel Parisi to accept a different remedy. "All were subjected to the same danger. All were entitled to like treat-



ment under law." Pope and Talbot, Inc. v. Hawn, 346 U.S. 406, 413, 74 S.Ct. 202, 98 L.Ed. 143 (1953), quoted with approval in Reed v. Yaka, supra, 373 U.S. at 415, 83 S.Ct. 1349, at 1353. Thus, the result here avoids the harsh and incongruous result urged by the plaintiffs but which the Supreme Court has admonished us to avoid.

Judge Sobeloff analyzed the Act's legislative history in scholarly fashion (App. 46-50):

"In its third attempt to provide compensation for the yet uncovered longshoremen, Congress in 1927 enacted the Longshoremen's Compensation Act.

Denominated "An Act to provide compensation for disability or death resulting from injuries to employees in certain maritime employment," 44 Stat. 1424, the Act embodies a comprehensive compensation plan for all longshoremen engaged in "loading, unloading, refitting, and repairing ships," on navigable waters. S. Rep. No. 973, 69th Cong., 1st Sess., p. 16. As originally drafted, the bill provided coverage for injuries "on a place within the admiralty jurisdiction of the United States, except employment of local concern and no direct relation to navigation or commerce." S. 3170 & H.R. 9498. Although enthusiastic about its general objectives, representatives of both the unions and the shipping industry uniformly voiced dissatisfaction with the bill's jurisdiction provision. At the Committee hearings, a union spokesman pointed out that as originally drawn, the effect of the bill would necessarily be harmful to repairmen and longshoremen who continually pass back and forth between state and federal jurisdiction, each

exclusive of the other. Hearings on S. 3170, Senate Judiciary Committee, 69th Cong., 1st Sess., March 16 and April 2, 1926, pp. 29-31. In the same vein, spokesmen for the shipping industry complained that the bill was not sufficiently inclusive and urged that the final bill "include all maritime employment under the admiralty jurisdiction." Senate Hearings, pp. 95-101. A representative of the Labor Department also appeared and testified that Congress had sufficient power to enact a compensation statute that would extend to all injuries to maritime workers occurring "on the dock, on the bridge and in the ship," and on behalf of the department argued for an amendment to the bill that would provide "coverage of the contract and not coverage of the men in one spot performing one part of the contract." Senate Hearings pp. 40-41.

The lone dissident voice was that of the International Association of Industrial Accident Boards and Commissions, author of the pending bill and the Acts previously declared unconstitutional. It sought to maintain the limited scope of the bill, leaving as much as was constitutionally permissible to the states.

At the conclusion of the hearings, the bill was revised and submitted to Congress in its present form. While no further explanation of the various revisions is to be found in either the committee reports or congressional debates, it is certainly reasonable to infer that the modifications represent an acquiescence in the broader coverage sought by almost all witnesses and, consequently, a rejection of the narrow jurisdictional position espoused by the IAIABC.

X X X

Note 7. . . The passage from the Senate Report No. 973, 69th Cong., 1st Sess. 16, most often relied upon to support the narrow jurisdictional view the Congress intended to limit coverage to injuries within the maritime tort jurisdiction as it was thought to exist, excluding pier-side injuries, reads as follows:

"The purpose of this bill is to provide for compensation, in the stead of liability, for a class of employees commonly known as 'longshoremen.' These men are mainly employed in loading, unloading, refitting, and repairing ships; but it should be remarked that injuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship so as to bring them within the maritime jurisdiction of the United States."

While it has been said that this passage suggests the Senate Committee intended the Act to be situs oriented, it is no less reasonable to read the passage as extending the benefits of the Act to all who may be brought within the maritime jurisdiction. Moreover, other passages from the Reports of both Houses indicate that Congress was primarily concerned with the status of the potential claimants. For example, in the Senate Report, in the paragraph immediately following the oft-cited passage quoted above, it is stated:

"If longshoremen could avail themselves of the benefits of State compensation laws, there would be no occasion for this legislation; but, unfortunately, they are excluded from these laws by reason of the character of their employment and they are not only excluded but the Supreme Court has more than once held that Federal legislation cannot, constitutionally, be enacted that will apply State laws to this occupation. (Emphasis added.) S.Rep. No. 973, 69th Cong., 1st Sess. 16."

To like effect is H.R. Rep. No. 1767, 69th Cong., 1st Sess. 20:

"The principle of workmen's compensation has become so firmly established that simple justice would seem to require that this class of maritime workers should be included in this legislation\* \* \*.

The bill as amended, therefore, will enable Congress to discharge its obligation to the maritime workers placed under their jurisdiction by the Constitution of the United States by providing for them a law whereby they may receive the benefits of workmen's compensation and thus afford them the same remedies that have been provided by legislation for those killed or injured in the course of their employment in nearly every State in the union."  
(Emphasis added.)

Or, as Congressman LaGuardia summed up:

"This law simply gives the longshoreman the benefit of up-to-date legislation to cover injuries sustained in the course of their employment. That is all there is to it." 68th Cong. Rec. 5414.

Clearly, nothing in this history shows anything

but congressional interest in covering workers in maritime employment injured as longshoreman Avery herein.

V. Petitioners Would Freeze Coverage To Longshoremen Injuries Only Occurring Within The Admiralty Port Jurisdiction As It Was Thought To Exist In 1927.

"Workmen's compensation is not confined by common law conceptions. . . ." O'Leary v. Brown - Pacific - Maxon, Inc., 340 U.S. 504, 506 (1951). Just as the

common law of independent contractor - agent is legally immaterial to the Jones Act, see *Hobson v. Texaco, Inc.*, 382 U.S. 262 (1966), likewise "the dock as an extension of the land" doctrine has no materiality when construing the Longshoremen's Act to carry out what Congress intended, that is, provide a Federal Compensation Act for those who "...are mainly employed in loading, unloading, refitting and repairing ships." *Norton v. Warner Co.*, 321 U.S. 565, 570 (1944).

Petitioners rely on *State Industrial Commission v. Nordenholt Corp.*, 259 U.S. 263 (1922). In *Nordenholt*, a young employee fell to his death from a load of bags on a dock to the floor of the dock. The dead youth's mother could either receive state compensation or nothing because of Jensen. The Court allowed the mother state compensation, holding as follows at 295 U.S. 276: "There is no pertinent federal statute; and application of the local law will not work material prejudice to any characteristic feature of the general maritime law." Looking at the reality of the *Nordenholt* case, it is truly strange that Petitioners attempt to use it as a

restrictive device, ignoring that a federal statute now exists. Nordenholt, supra, was decided in 1922 and the Supreme Court in Calbeck v. Travelers Insurance Co., 370 U.S. 114, 118 (1962), stated:

But we must candidly acknowledge that the decisions between 1917 and 1926 provide no reliable determinant of valid state law coverage.

Citing Nordenholt as the prime example, the Court in Calbeck, supra at 119 stated: "On the other hand, awards under state compensation acts were sustained in situations wherein the effect on uniformity was often difficult to distinguish from those found to be outside the purview of state law."

The dictum that Petitioners rely on from Swanson v. Marra Bros., Inc., 328 U.S. 1 (1946), merely cites State Industrial Commission v. Nordenholt Corp., 259 U.S. 263 (1922) as authority. See Swanson v. Marra Bros., Inc., 328 U.S. 1, 7 (1946). Swanson is not a case under the Longshoremen's Act, but merely held that a longshoreman on a dock struck by a vessel's falling life ring could not sue his employer (not owner or operator of the vessel) under the Jones Act. Moreover, the Swanson dictum - restricting

longshoremen injured under the circumstances herein to only pursue "land tort remedies" - is obsolescent and no longer the law. Were Swanson to file suit today and name the vessel owner as defendant, there is no question the Courts would recognize and enforce his claim as a maritime tort. *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206 (1963); *Strika v. Netherlands Ministry*, 185 F.2d 555 (2d Cir. 1950), cert. denied, 341 U.S. 904. And under any circumstances, the Swanson dictum cannot today be authority for withholding the Act's jurisdiction from longshoreman Avery and his fellows in light of the Supreme Court holding in *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114, 130 (1962):

Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject matter. . . . Congress intended the compensation act to have a coverage co-extensive with the limits of its authority. . . its constitutional powers. . . .

Also relied on by Petitioners, *T. Smith & Son, Inc. v. Taylor*, 276 U.S. 179 (1928) concerns a widow's claim for death occurring in 1925, again before the passage of the Federal Act. Like

Nordenholt, supra, T. Smith's only significance is as a historical relic from the days before Congress acted. The Court in Michigan Mutual Liability Co. v. Arrien, 344 F.2d 640, 645 (2d Cir. 1965), cert. denied, 382 U.S. 835 correctly read T. Smith, supra, as follows:

"...The Court simply held that application of a state compensation statute did not encroach upon federal admiralty jurisdiction. Mr. Justice Butler understandably did not mention the Longshoremen's Act for the federal remedy was not yet effective. We do not question that the skid on which Parisi was injured was sufficiently connected with the land to sustain an award under the State Compensation Act. But to concede this does not mean that a federal remedy is precluded; the Longshoremen's Act was intended to provide compensation for all injuries occurring upon navigable waters, "whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law." Calbeck, supra, 370 U.S. at 117, 82 S.Ct. at 1198.

Petitioners reliance on 1927 vintage opinions of the Commission overlooks the fact that subsequent judicial decisions have repudiated the Commission's advisory opinions. In Calbeck v. Travelers Insurance Co., 114, 127 n.15 (1962) the Court referred to another somewhat similar long standing, but overruled,



opinion as follows:

We attach no significance to Opinion No. 7, September 2, 1927, of the Employees Compensation Commission (now the Bureau of Employees Compensation). . . . The department was not foreclosed in the instant case from changing an interpretation of the statute which was clear error.

Calbeck expressly repudiated a determination of jurisdiction on the basis ". . . of the line of demarcation as a static one fixed at pre-1927 constitutional decisions." *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114, 126 (1962).

Petitioners misread *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114, 117 (1961), ignoring the Court's statement: "Our conclusion is that Congress invoked its constitutional power so as to provide compensation for all injuries sustained by employees on navigable waters whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law." The Court in *Calbeck*, *supra*, holds that there are areas of overlapping state and federal compensation coverage, and refuses to construe coverage as mutually exclusive state-federal, but rather equates federal coverage with

"the limits of maritime jurisdiction", 370 U.S. 125, 126:

"... A restriction of federal coverage short of the limits of the maritime jurisdiction could have avoided defeating the objective of assuring a compensation remedy for every injury on navigable waters only if Congress had provided that federal compensation would reach any case not actually covered by a state statute. But in order to have accomplished this result, the statute would have had to withdraw federal coverage, not wherever a state compensation remedy "may be" validly provided, but only wherever a state compensation remedy "is" validly provided. Even if a court could properly read "may be" as meaning "is", such a reading would make federal coverage in the "local concern" area depend on whether or not a state legislature had taken certain action—an intention plainly not to be imputed to a Congress whose recent efforts to leave the matter entirely to the States had twice been struck down as unconstitutional delegations of congressional power. (Emphasis added)

... We cannot conclude that Congress imposed such a burden on the administration of Compensation by thus perpetuating the confusion generated by Jensen. To dispel that confusion was one of the chief purposes of the Longshoremen's Act. (Emphasis added)

The Brief for The National Maritime Compensation Committee mistakenly relies on Pennsylvania R.R. Co. v. O'Rourke, 344 U.S. 334 (1953). O'Rourke did not

concern Sec. 903 of the Act, as everybody conceded that the car float upon which O'Rourke was injured was upon navigable waters. Instead, Sec. 902 (4), the definition of "employer", was only involved. The Court held that the Act applied if the employer had any employees in maritime employment, and under Sec. 905, the Act was held to bar O'Rourke's FELA action.

Petitioners make much of the action by Congress in 1958 authorizing a set of safety and health regulations for the longshoring industry, wherein the House Report mentions that State safety statutes protect the longshoreman on the dock. The report does not say that the Federal safety regulations do not cover the longshoreman in the course of his

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<sup>1</sup>But see *Hawn & Ross Island Sand & Gravel Co.*, 358 U.S. 272 (1959) when employee injured on employ barge was allowed to sue his employer under state law for civil damages, notwithstanding the obvious application of the Federal Compensation Act. And today, O'Rourke could sue his Railroad employer, the owner of the barge, for breach of the warranty of seaworthiness. *Reed v. The Yaka*, 373 U.S. 410 (1963); *Jackson v. Lykes Bros. S.S. Co.* 386 U.S. 7 (1967); *Schell v. C&O R.R. Co.*, 395 F.2d 910 (4th Cir. 1968); *Biggs v. Norfolk Dredging Co.*, 360 F.2d 360 (4th Cir. 1966). See also *Is Pennsylvania R.R. Co. v. O'Rourke Still Good Law?*, 1966 American Trial Lawyers Convention Transcript 104 (The W. H. Anderson Co.).

employment on the dock, and the Court's construction of the safety regulations imply such broad Federal coverage. See, e.g., *Provenza v. American Export Lines, Inc.*, 324 F.2d 660 (4th Cir. 1963), cert. denied, 376 U.S. 952. Petitioners fail to point out the following, also found in said House Report No. 2287, 85th Congress, 2d Sess. (July 28, 1958), pp. 3844-45: "The Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424: 33 U.S.C. 901 et seq.), provides compensation for injuries suffered by longshoremen, ship repairmen, ship servicemen and workers in related employment when they are working for private employers within the Federal maritime jurisdiction. . . ." (Emphasis added) In discussing the safety and health regulations for the longshoring industry, the House Report states as follows under, "Purpose of Legislation": "It is designed to bring about a greater degree of safety in the industry. . . ." (Emphasis added) ". . . [I]t was brought out that stevedoring is the most hazardous of all industries which report their experience to the bureau of labor statistics. . . . This is seven times the rate in

manufacturing activities."

Petitioners reliance on *Hastings v. Mann*, 340 F.2d 910 (4th Cir. 1965), cert. denied, 380 U.S. 963 is inappropriate, as it is not a case under the Act but a tort case for injury on a launching ramp. *Hastings* was the patron of a small, private marina and not a longshoreman entitled to the beneficent principles and protection of the Longshoremen's and Harbor Workers' Compensation Act. *Hastings* held that admiralty tort jurisdiction did not obtain on the launching ramp, but reasserted that admiralty tort jurisdiction obtained when harm was caused by a vessel, as herein. Moreover, if *Hastings* sued for breach of his maritime contract for proper marina services, he would have had an action properly cognizable within admiralty contract jurisdiction. *Leavenworth Colby, Admiralty Unification*, 54 Georgetown L. J. 1258, 1267 n.30 (1966).

None of the decisions from the Fifth and Ninth Circuits, relied on by the Petitioners, involve the vessel's own loading gear causing injury to a longshoreman working the ship, as herein. See

Nicholson v. Calbeck, 385 F.2d 221 (5th Cir. 1967), cert. denied, 389 U.S. 1051; Travelers Insur. Co. v. Shea, 382 F.2d 344 (5th Cir. 1967), cert. denied sub nom. McCullough v. Travelers Insur. Co., 389 U.S. 1050; Houser v. O'Leary, 383 F.2d 730 (9th Cir. 1967), cert. denied, 390 U.S. 954. These decisions misconstrue Calbeck's approach to the Act, and ignore Congress's intention to compensate longshoremen under the Act up to the limit of Congress's Constitutional power. As Judge Sobeloff states (App. 53 n.13): "It is noteworthy that the court in Travelers v. Shea, supra, fails to analyze or consider the impact of Calbeck or Yaka on the Longshoremen's Compensation Act."

Petitioners would freeze coverage to longshoremen injuries only occurring within the admiralty tort jurisdiction as it was thought to exist in 1927.

#### CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the en banc Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

Ralph Rabinowitz, Counsel  
for Respondent Albert Avery

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Nos. <sup>9</sup> and <sup>16</sup> ~~600~~

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**Supreme Court of the United States** WILLIAM F. DAVIS, CLERK

OCTOBER TERM, 1968

NACIREMA OPERATING Co., Inc. and  
LIBERTY MUTUAL INSURANCE COMPANY,

*Petitioners,*

—v.—

WILLIAM H. JOHNSON, JULIA T. KLOSEK and  
ALBERT AVERY.

JOHN P. TRAYNOR and JERRY C. OOSTING,  
Deputy Commissioners,

*Petitioners,*

—v.—

WILLIAM H. JOHNSON, JULIA T. KLOSEK and  
ALBERT AVERY.

ON WRITS OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FOURTH CIRCUIT

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**BRIEF ON BEHALF OF  
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,  
AFL-CIO, AS *AMICUS CURIAE***

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# Supreme Court of the United States

Nos. 528 and 663

OCTOBER TERM, 1968

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NACIREMA OPERATING CO., INC. and  
LIBERTY MUTUAL INSURANCE COMPANY,

*Petitioners,*

—v.—

WILLIAM H. JOHNSON, JULIA T. KLOSEK and  
ALBERT AVERY.

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JOHN P. TRAYNOR and JERRY C. OOSTING,  
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ON WRITS OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FOURTH CIRCUIT

---

**BRIEF ON BEHALF OF  
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,  
AFL-CIO, AS *AMICUS CURIAE***

---

## Consent of Parties

All of the parties in both cases have consented in writing to the filing of this brief *amicus curiae*, and their written consents have been filed with the Clerk.

## Statement of Interest

The International Longshoremen's Association, AFL-CIO, ("ILA") is an international labor union representing the bulk of the workmen covered by the Longshoremen's and Harbor Workers' Compensation Act. The ILA represents all longshoremen along the Atlantic and Gulf Coasts from Maine to Texas, on the Great Lakes, and on various inland waterways. Its approximately 100,000 members and their families are the principal intended beneficiaries of this Act.

The ILA was one of the chief sponsors of the Act in 1926 and 1927, and several ILA representatives testified in its support at the Congressional hearings leading to its enactment.

As representative of the employees principally concerned with the administration and construction of this vital, remedial statute, the ILA is intensely interested in assuring equitable treatment to all its members who load and discharge waterborne cargo in the harbors of the United States. The union participated as *amicus curiae* in these cases before the Court of Appeals for the Fourth Circuit.

### The Nature of Longshore Employment

The essence of longshore employment, and the only type of work involved in these cases, is the loading of cargo from pier to vessel and the discharge of cargo from vessel to pier. The term "pier" means a man-made structure extending out over the navigable waters, typically for a distance of several hundred feet.

The piers in these cases rested on pilings which sank at intervals into the water below. These pilings did not obstruct the free flow of water beneath the pier, and indeed, permitted the passage of small boats and barges (App. 45).

Longshoremen customarily work in a gang or group, and members of the gang are located interchangeably on the ship or the pier. The same men may be shuttled back and forth from ship to pier throughout the day as the nature and flow of cargo operations dictates. Gang members often interchange assignments between the ship and dock so that the more onerous work in the ship's hold is rotated among the members of the group (App. 45).

In some operations, longshoremen actually carry or hand-truck cargo from ship to dock, or vice versa, so that they are constantly moving from one surface to the other.

Because the same longshoreman works both on the vessel and the pier in the usual course of his daily employment, his employment falls within the scope of both federal and state compensation statutes, however construed, and the employer must therefore cover his longshore employees under each Act. *Michigan Mutual Liability Co. v. Arrien*, 344 F. 2d 640, 647 (2d Cir. 1965) *cert. den'd.*, 382 U.S. 835.

### Summary of Argument

1. Respondents' injuries occurred "upon navigable waters" and are therefore covered by the Longshoremen's Act. A pier is a man-made structure extending out over the freely flowing waters without changing the boundaries or course of the waterway. The waters remain navigable in fact, and the presence of readily removable man-made structures protruding into the stream does not deprive the entire stream, including that portion flowing under the deck of the pier, of the status of "navigable waters".

The legal fiction developed in early cases that a pier is a permanent extension of the land is irrelevant. That fiction, which is factually inaccurate, served to delimit the then understood constitutional boundaries between state

regulatory jurisdiction and admiralty tort jurisdiction. But the Longshoremen's Act, as this Court has held, did not codify these pre-1927 demarcation lines, and the fact that state jurisdiction may validly extend to pierside injuries does not preclude coverage under the Federal Longshoremen's Act as well. Nothing in the Longshoremen's Act itself bars coverage of injuries on piers extending over navigable waters, and the Act covers all injuries upon navigable waters, not merely some of them.

2. The Longshoremen's Act represents an exercise of the fullest Congressional power over the subject matter. Congress unquestionably has power to provide compensation for longshoremen injured on the pier while loading or discharging vessels moored alongside. Any doubt as to this is removed by the 1948 Admiralty Extension Act which confirmed the extension of admiralty and maritime jurisdiction to pierside injuries and which overruled legislatively the judicial decisions underlying the legal fiction that a pier is an extension of the land.

The original language of the compensation bill introduced into Congress in 1926 covered all injuries "within the admiralty jurisdiction". Subsequently representatives of interested labor unions, employer organizations and the United States Department of Labor all testified in favor of coverage of longshoremen's pierside injuries. Some testified that the language of the bill accomplished this objective, while others expressed doubts and urged that the language be expanded to assure that the desired coverage was achieved. The legislative history thus indicates that the term "upon navigable waters" was substituted for the term "within the admiralty jurisdiction" not to narrow the scope of the bill, but to make sure that its coverage extended to all injuries intended by its proponents to be covered, to the fullest extent permissible under the Constitution.

3. Although apparent incongruities in peripheral cases may be suggested under any coverage test, the most basic incongruity would be to give only partial compensation protection to longshoremen who regularly work interchangeably on the vessel and the pier. The test urged by petitioners defeats the basic Congressional purpose of assuring uniform, certain protection which is not dependent upon the vicissitudes of state coverage.

## ARGUMENT

### I.

#### **The Longshoremen's Injuries in These Cases Occurred Upon the Navigable Waters of the United States.**

Petitioners' argument rests, at bottom, on the proposition that the 1927 Longshoremen's Act was intended to provide compensation coverage only for those employees whom this Court had previously held to be beyond the constitutional reach of state legislation; and since the Court had held a pier to be "an extension of the land" prior to 1927, pierside injuries were subject to state law and, therefore, outside the scope of the federal act.

Such a restrictive concept of the Longshoremen's Act was squarely rejected by this Court in *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114 (1962). In *Calbeck* the Court reversed a denial of federal compensation to a worker whose injury under the pre-1927 decisional law was clearly compensable under state legislation. Holding that the injury fell within the "twilight" zone covered by both federal and state compensation statutes, the Court finally laid at rest the notion that permissible state compensation coverage, even if expressly sanctioned by pre-1927 judicial decisions, necessarily precluded fed-



eral protection as well. See also *Davis v. Department of Labor*, 317 U.S. 249 (1942).

Both before and after *Calbeck*, the courts have sustained federal coverage of injuries which unquestionably also fell within the concurrent jurisdiction of the state. *Avondale Marine Ways, Inc. v. Henderson*, 346 U.S. 366 (1953); *Interlake Steamship v. Nielson*, 338 F.2d 879 (6th Cir. 1964); *Holland v. Harrison Bros.*, 306 F.2d 369 (5th Cir. 1962).

Thus the fact that early federal decisions considered a pier to be an extension of the land, and hence within the reach of state power, does not answer the question posed by these cases. For the Compensation Act does not in terms exclude injuries occurring on a pier resting over water, or for that matter, on any man-made structure extending into the natural course of navigable waters. Rather it expressly embraces all injuries occurring upon the navigable waters, and, at least since *Calbeck*, this means whether or not state jurisdiction may also validly attach.

A pier is in fact "upon navigable waters", as that term is commonly understood and as it has developed in the law of admiralty. A pier is nothing more than a man-made protuberance sticking out into the course of the stream, but leaving unchanged the natural course of the waters. It is like a finger, and most piers are known in the maritime industry as "finger piers".

Unlike permanent land fill, the construction of a pier above the flowing waters does not change the boundaries of the waterway one iota. The shoreline remains precisely as it was in its natural state.

Nor is it accurate to characterize a pier as a "permanent" structure. Like any man-made construction (and

most piers are far from the sturdiest of man's creations) built for a specific purpose, piers become obsolescent, both physically and technologically. In the Port of New York, for example, recent years have witnessed the demolition of a number of deteriorating piers. New methods of cargo storage and handling are rendering other piers industrially inadequate, and they too will be torn down. In some instances a demolished pier is, in time, replaced by another one, usually with different dimensions and located over a different portion of the navigable stream. In other instances the pier is not replaced at all, for fewer piers with larger adjacent landward storage areas now serve the purpose of a multitude of older piers.

But the "navigable waters" of admiralty jurisdiction do not depend upon these vicissitudes. Rather they are determined by the natural, historic boundaries of the stream in its natural state irrespective of man-made "fingers" which may jut out above the waters. Cognizant of this Court's admonition that "When once found to be navigable, a waterway remains so" (*United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 408 (1940)), the Court of Appeals for the Second Circuit has held a body of water to be navigable if "it has been used or was suitable for use in the past, or . . . it could be made suitable for use in the future by reasonable improvements" (*Rochester Gas and Electric Corp. v. Federal Power Commission*, 344 F.2d 594, 596 (2d Cir. 1965)). This Court has itself held that the existence of "artificial obstructions . . . does not prevent the stream from being regarded as navigable in law, if, supposing them to be abated, it be navigable in fact in its natural state." *Economy Light & Power Co. v. United States*, 256 U.S. 113, 118 (1921). See also *The Montello*, 87 U.S. 430, 431 (1874); *Greenleaf Johnson Co. v. Garrison*, 237 U.S. 251, 268 (1915).

In light of these authorities, the Court below aptly concluded that "the waters in the instant case" were "navigable in fact" because they were "navigable prior to the construction of the pier, will again be open to unlimited navigation if the piers are ever removed, and most relevantly, are now used in navigation." (App. 55-56, footnote 15).

The International Longshoremen's Association urges that injury upon any pier extending into the stream is covered by the Act whether or not the waters continue to flow beneath its deck. Although some piers are constructed so as to block the waters' flow while they remain standing, these, too, are located over the course of the stream in its natural state. Waters formerly flowed where the pier currently stands and will flow again upon its removal. Such a pier, like a pier built on pilings, does not change the natural shoreline. In either event, the pier is located upon the navigable waters.

*A fortiori* the statutory standard is met when, as in the cases at bar, the waters continue to flow freely under the pier and small boats continue to navigate under the pier deck on which the injuries occurred. For the navigability of a body of water has never depended upon the size of the vessel capable of using it, and the term "navigable waters" even includes falls, shallows or rapids which compel recourse to land carriage over a portion of the journey. 16 U.S.C. § 796; *United States v. Holt State Bank*, 270 U.S. 49 (1926); *Morrison-Knudsen Co. v. O'Leary*, 288 F.2d 542 (9th Cir. 1961), *cert. den'd*, 368 U.S. 817; *Miami Beach Jockey Club v. Dern*, 83 F.2d 715, 718 (D.C. Cir. 1936).

Obviously the words "upon navigable waters" do not require that the victim be actually touching the waters themselves at the moment of injury, for the Act does not limit its protection to swimmers and divers. There is no dispute

that a longshoreman working aboard ship is covered by the Act, although the deck of a ship is usually higher above the water than the deck of the pier to which it is moored.

Assuming *arguendo* that *situs* limitations have any applicability to the scope of Longshoremen's Act coverage,<sup>1</sup> the term "upon navigable waters" means, at most, that the claimant be upon some surface which is either above the waters, on a vertical plane, or, taking a stricter test, that he be standing upon a surface which itself touches the navigable waters. The pier meets this test as fully as the vessel.

It has been held that the term "on the high seas" connotes a vertical dimension and not merely a horizontal plane, thus embracing injuries occurring in an airplane flying over the ocean. *D'Aleman v. Pan American World Airways*, 259 F. 2d 493 (2d Cir. 1958); *Weinstein v. Eastern Airlines, Inc.*, 316 F.2d 758 (3d Cir. 1963). The word "upon" in the Longshoremen's Compensation Act can hardly be given narrower meaning than the word "on"

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<sup>1</sup> Although certain briefs supporting petitioners' position devote considerable attention to the question of "status" as against "situs" orientation, it must be borne in mind that the decision below does not rest on this ground alone. The court below, while favoring a status approach, also expressly held that the injuries occurred "upon navigable waters" in a *situs* sense. Under the correct construction of that statutory term, there would appear to be little difference in coverage between the two standards, apart from peripheral cases which can be readily conjured up under any test. Congress intended to protect "longshoremen", a group understood to mean employees engaged in loading and unloading ships. *Norton v. Warner Co.*, 321 U.S. 565, 570 (1944). The loading and unloading of ships is performed essentially on the ship itself or on the adjacent pier, with some work performed on gangway, skid or similar device. Since all such places are situated "upon navigable waters", the basic coverage contemplated by statute is achieved under either test. It is only when the term "upon navigable waters" is given the improperly restrictive construction contended for by petitioners that a divergence in impact develops through exclusion of a substantial portion of the longshore work force which Congress intended to protect.

in the Federal Death on the High Seas Act. (46 U.S.C. §§ 761-767, 41 Stat. 537).

Cases dealing with drydock injuries have sustained coverage of employees standing on dry land, immediately alongside the drydock, when the work is essential to the performance of the operations of the drydock. *Holland v. Harrison Bros. Drydock & Repair Yard, Inc.*, 306 F.2d 369 (5th Cir. 1962); *Maryland Cas. Co. v. Lawson*, 101 F.2d 732 (5th Cir. 1939); cf. *Avondale Marine Ways, Inc. v. Henderson*, 346 U.S. 366 (1953). A longshoreman loading and discharging a vessel from the immediately adjacent pier which itself lies over the natural course of waterway is entitled to no less protection.

In essence petitioners' argument rests on a legal fiction embodying two factual errors. The legal fiction proclaims that a pier is a permanent extension of the land. In fact, it is neither permanent nor an extension of the land. It does not change the course of the waterway or the boundary line between land and water. When it is removed, the waters flow just as before. And a large portion of American piers, like those herein, do not even interrupt the passage of the waters while they stand.<sup>2</sup>

The longshoremen whom Congress intended to protect through this remedial Act cannot be denied that protection

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<sup>2</sup> This legal fiction is functionally inaccurate as well. Its functional rationale was expressed in the early case of *Cleveland T. & V.R. Co. v. Cleveland Steamship Co.*, 208 U.S. 316 (1908), the cited authority for *State Industrial Commission v. Nordenholt Corp.*, 259 U.S. 263, 275 (1922), as follows (208 U.S., at 321):

"But the bridges, shore docks, protection piling piers, etc., pertained to the land. They were structures connected with the shore and immediately concerned commerce upon land. None of these structures were aids to navigation in the maritime sense, but extensions of the shore and aids to commerce on land as such."

It is difficult to understand how a pier, without which waterborne commerce would be impossible, can be characterized as con-

through invocation of a legal fiction, particularly one developed in other contexts. For it is irrelevant, in light of *Davis* and *Calbeck*, that this fiction served as constitutional sanction for state regulation of injuries or transactions occurring on piers and wharves. And it is equally irrelevant that this same fiction at one time may have been thought to set limits to admiralty tort jurisdiction. In 1969 there can be no doubt that Congress may lawfully provide compensation protection to injuries sustained by longshoremen on piers situated over, and extending into, the navigable waters, either under admiralty tort jurisdiction, admiralty contract jurisdiction, or the commerce power.

Nothing in the Act itself justifies a denial of protection to longshoremen loading and discharging vessels from piers or wharves, and any claim that the legal fiction on which it rests remains relevant today was swept away by *Davis* and *Calbeck*.

In the apt words of Judge Cardozo, quoted in a similar context in the Longshoremen's Act case of *Michigan Mutual Liability Co. v. Arrien*, 344 F.2d 640, 644 (2d Cir. 1965) the instant case is a striking example of

"the dangers of a 'jurisprudence of conceptions' \* \* \* the extension of a maxim or a definition with relentless disregard of consequences to 'a dryly logical extreme.' \* \* \* In such circumstances, \* \* \* general

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cerning only "commerce upon land" and not an "~~aid~~ to commerce" upon water. Piers are aids to navigation upon navigable waters. *Atlee v. Northwestern Union Packet Co.*, 21 Wall. 389, 393 (1875).

In any event, this underlying functional explanation of the *Nordenholt* rule is essentially "status oriented", not "situs oriented" at all. On the one hand petitioners insist that the Longshoremen's Act is exclusively "situs oriented", and in the next breath they urge that in the crucial area of pierside injuries, coverage must be denied on the basis of a judge-made rule which is nowhere reflected in the statute itself and which is plainly status oriented in its derivation.

maxims \* \* \* framed alio intuitu \* \* \* must be re-formulated and readapted to meet exceptional conditions."

Quoting approvingly from his own brief in *Calbeck* the Solicitor General's brief (p. 12) concedes that a "dock" is in fact "upon navigable waters". This, we submit, is dispositive of the instant cases. For if a pier, like a vessel, sits "upon navigable waters", then the statutory test is satisfied just as fully by the longshoreman standing upon the deck of a pier as by the longshoreman standing upon the deck of a vessel.

Point III of the Solicitor General's brief implicitly recognizes the force of this argument, but urges that such a disposition would disturb the "*Jensen* line of demarcation". In so arguing, however, it is the Solicitor General, not the court below, who is seeking to ignore the language actually used by Congress and to distort the coverage test prescribed by the Act. As this Court held in *Calbeck*, (370 U.S. at 117) "Our conclusion is that Congress invoked its constitutional power so as to provide compensation for all injuries sustained by employees on navigable waters whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law." This holding simply cannot be reconciled with the approach urged by the Solicitor General herein.



## II.

**The Terms, Purpose and Legislative History of the Act Confirm the Intent to Cover Pierside Longshore Injuries, to the Full Extent Permitted by the Constitution.**

The Longshoremen's and Harbor Workers Compensation Act is entitled "An Act to provide compensation for disability or death resulting from injury to employees in certain maritime employment." 44 Stat. 1424. This Court reiterated in *Calbeck* that the Act extends not to some but "all injuries sustained by employees on navigable waters", 370 U.S. 114, at 117, and, again, at 120. Emphasizing the breadth of the statutory coverage, the Court there (370 U.S., at 130) held, quoting with approval from *Continental Casualty Co. v. Lawson*, 64 F.2d 802, 804 (5th Cir. 1933):

"The elaborate provisions of the Act, viewed in the light of prior Congressional legislation as interpreted by the Supreme Court, leaves no room for doubt, as it appears to us, that Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject-matter."

There can be little question that Congress is amply empowered under various jurisdictional heads to provide compensation for longshoremen injured in the loading or discharge of a ship while standing on the adjacent pier. The Admiralty Extension Act of 1948, 62 Stat. 496, 46 U.S.C. Section 740, which relates only to admiralty tort jurisdiction, is more than sufficient to demonstrate Congressional jurisdiction over the injuries suffered by the claimants at bar. And the Admiralty Extension Act itself did not necessarily push the Congressional power in admiralty tort to its furthestmost Constitutional limits.



That the legislative history of the Admiralty Extension Act did not expressly refer to the Longshoremen's Compensation Act is not significant. The Admiralty Extension Act applied generally to "the admiralty and maritime jurisdiction of the United States" and extended to "all cases of damage or injury" caused by a vessel "on navigable water" (substantially the same term used in the Longshoremen's Act). There was no need for Congress to enumerate every instance in which this general extension of admiralty jurisdiction affected the scope of some pre-existing right or claim, whether conferred by statute or developed through decisional law. Nor is there any reason why subsequent amendments to the Longshoremen's Act which merely increased the level of benefits should have referred to the effect on coverage of the Admiralty Extension Act.

The significant point is that the Longshoremen's Act was cast in terms of a concept—"navigable waters"—which traditionally expressed the fullest scope of admiralty jurisdiction *Caldaro v. B. & O. Railroad Co.*, 166 F.Supp. 833 (E.D.N.Y. 1956). Thus when Congress in 1948 made clear that admiralty jurisdiction extended to pierside injuries, it must have understood that it was thereby affecting the coverage of the Compensation Act or at least eliminating doubts as to coverage stemming from earlier judicial decisions of which Congress obviously disapproved.

For it is clear that the Admiralty Extension Act overruled legislatively the very decisions (e.g. *Cleveland T. & V.R. Co. v. Cleveland Steamship Co.*, *supra*, 208 U.S. 316) which form the basis of the "pier is an extension of the land" doctrine, on which petitioners herein rest their case. See *Michigan Mutual Liability Co. v. Arrien*, 233 F.Supp. 496 (S.D. N.Y. 1964), *aff'd.*, 344 F.2d 640; *Boston Metals Co. v. O'Hearne*, — F.Supp. —, 1964

AMC 2351 (D.Md.) *aff'd*, 329 F.2d 504 (4th Cir. 1964), *cert. den'd*, 379 U.S. 824.

When the longshoremen's compensation bill was originally introduced in Congress in 1926, its coverage extended to all injuries "on a place within the admiralty jurisdiction of the United States, except employment of local concern and no direct relation to navigation or commerce." S.3170 and H.R.9498. In retrospect, it seems clear that had this language remained, the present claimants would have qualified, under current statutory and judicial concepts of admiralty jurisdiction. The question then arises as to whether the substitution of the statutory language "upon the navigable waters of the United States" for the original language "within the admiralty jurisdiction" was designed to narrow the coverage of the bill.

Nothing in the legislative history indicates any such intent. Indeed, the legislative history is to the contrary. Although some witnesses believed the original language adequate to cover pierside injuries (Hearings on S.3170, Senate Committee of the Judiciary, 69th Cong., 1st Sess., pp. 26-27), others feared that the coverage clause was "indefinite" and "vague" (Ibid, p. 95). One experienced admiralty lawyer, questioning the adequacy of this clause, observed that

"We want to be sure that every-body gets in under those words. And I am not sure that they do." (Ibid, p. 101.)

The Chairman himself expressed doubt that the clause contained a "sufficient description" of the coverage intended. (Ibid. p. 56.)

Significantly, a spokesman for the United States Department of Labor testified in favor of coverage of in-

juries occurring on the dock as well as the ship (*Ibid*, pp. 40-41). As far as is known, the Department of Labor has, to date, never changed its position that the Federal statute, once adopted, covered injuries sustained by workers engaged in maritime employment over, above, or bordering upon navigable waters.

As the Court below observed (App. 47), the hearings on this bill did not present the usual pattern of labor representatives urging one course and employer representatives urging the opposite. Here broad coverage was sought by both sides. It is, therefore, reasonable to conclude, as did the Court below, that the substitution in language was not designed to narrow the coverage of the bill, but, if anything, to broaden it.

In this connection the Second Circuit, in *Michigan Mutual Liability Co. v. Arrien*, *supra* 344 F.2d 640, observed (p. 645, footnote 3):

"Moreover, we are not persuaded that ancient decisions fixing the limits of admiralty jurisdiction should be determinative when the issue is whether a Deputy Commissioner's conclusion that an injury occurred 'upon the navigable waters,' within the meaning of the Compensation Act, is contrary to the law. Indeed, the dissent's recognition that in enacting the 1927 Act Congress chose the phrase 'upon the navigable waters,' rather than 'within the admiralty jurisdiction,' suggests rejection, rather than adoption, of distinctions evolved in fixing the reach of the federal admiralty jurisdiction."

This reading of the legislative history accords with the statement of the Court in *Calbeck* (370 U.S. at 126) rejecting "the line of demarcation as a static one fixed at pre-1927 constitutional decisions."

In short, Congress did not intend to freeze the statutory coverage by the very line of decisions whose effects it was seeking to overcome. It is, therefore, a frustration of Congressional purpose to limit the statutory terms—whether they be “admiralty jurisdiction” or “navigable waters”—to their pre-1927 content, although we would also urge that even the 1927 meaning of “navigable waters” sustains respondents’ position herein. But as the statutory terms receive further judicial development and amplification, the statute itself must be construed accordingly. Particularly is this so when Congress chose to define the statutory coverage through a term—“upon navigable waters”—which pervades admiralty law generally. Congress must have intended that as this term became the subject of further judicial development, its meaning in Section 3 of the Longshoremen’s Act would develop accordingly. Certainly there is no indication either in the statute or its legislative history that Congress intended the term “upon navigable waters” to be given anything less than its fullest and broadest scope.

The single excerpt from the Senate Committee Report, so heavily relied upon by petitioners, does not evince a Congressional intent to eliminate coverage of pierside injuries. The statement that coverage extends only to injuries occurring between wharf and ship “so as to bring them within the maritime jurisdiction” is not cast in terms of Congressional intent but as a Constitutional limitation on the power of Congress. It must be recalled that the Supreme Court had only recently invalidated a different form of Congressional response to earlier Court decisions, and the entire subject had been treated judicially in constitutional terms. The Senate report indicated nothing more than the draftsman’s prediction of the limited scope which the Court would permit to a federal compensation law.

If the understanding of the draftsman of the Senate Report as to the limits of maritime jurisdiction was inaccurate, or if the Court's own pre-1927 decisions on this subject were overly restrictive, or, if the maritime jurisdiction expanded over the years, there is no evidence that Congress intended the pre-1927 judicially imposed limitations to serve as a continuing limitation on the scope of an act expressly intended to protect longshoremen engaged in loading and discharging vessels. On the contrary, *Calbeck* teaches that Congress intended to use the full scope of its admiralty powers and that the term "upon navigable waters" should be given its broadest meaning without regard to the demarcation line apparently prescribed by the pre-1927 cases.

### III.

**The Statutory Construction Adopted Below Eliminates the Basic Incongruity and Inequity of Providing Federal Compensation to Longshoremen During Only a Portion of Their Working Day and Leaving Them Otherwise Dependent on the Vagaries of State Compensation Laws.**

It is not difficult to pose apparent incongruities in borderline cases under any standard adopted under the Longshoremen's Act. Both opinions below engage in this technique, and other examples may readily be suggested. For example, under petitioners' proposed test, a longshoreman hit by a ship's crane while standing on a pier is covered by the federal act if he is knocked off the pier and into the water. But the same man standing on the same spot and hit by the same crane is unprotected if he falls on the pier itself. Moreover, he would presumably be unprotected if he was knocked off the pier but suffered his

injury by hitting the side of the pier before his body reached the water.<sup>3</sup>

On the other hand, it is unclear under petitioners' test whether federal protection would attach to a longshoreman who had been standing on the edge of the pier, but who had jumped up, or outwards, prior to the moment of impact, so that his feet were not touching the pier at that crucial moment.

Adjudicated cases have approved compensation to drydock employees standing on land alongside the drydock on the ground that their work is integral to the drydock operation. See p. 10, *supra*. But petitioners would deny compensation to longshoremen whose work is equally integral to the loading or discharge of the adjacent vessel and who are standing not on dry land but on a pier which extends over the navigable waters. No such distinctions can be justified under the purpose and terms of the Act.

All these incongruities pale into insignificance, however, before the basic, pervasive incongruity urged by petitioners: that longshore operations performed by employees working interchangeably between vessel and pier are covered by the Longshoremen's Act during the moments when they work on the vessel but not when the same men

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<sup>3</sup> In *Davis v. Department of Labor*, 317 U.S. 249, 254, this Court remarked that the closeness of many cases raising "points of interpretation [under the Longshoremen's Act] has caused much serious confusion". In an accompanying footnote, the Court then declared that "a question not mentioned above which has been considered in several cases is that of the jurisdiction to which are to be assigned accidents affecting persons loading boats while on the wharf; accidents affecting persons loading vessels while on the vessel; accidents affecting persons standing on either the vessel or the wharf who are knocked into the water". This hardly seems to indicate that the question of longshoremen suffering pier-side injuries was deemed so definitely settled as to preclude federal "twilight zone" protection.

perform the same function during the same day on the adjacent pier.

Such a construction, moreover, leads to the very results condemned by this Court in *Calbeck*. It defeats the uniformity and certainty of coverage intended by Congress, and it leaves longshoremen working on the pier dependent upon the uncertain coverage of state compensation laws.

Finally, the test adopted by the Fourth Circuit is readily administerable. If status be the criterion, then the simple issue is whether the claimant was engaged at the time of injury in the loading or discharge of a vessel, and the far-fetched examples suggested in opposing briefs have no pertinence. If situs be deemed the appropriate approach, then all injuries occurring within and above the confines of the natural boundaries of the waterway, without regard to the artificial, non-permanent intrusion of man-made piers, are covered. At the very least, longshore injuries would be covered if they occurred on a place located above the flowing navigable waters. Any of these tests is easier to administer than that urged by petitioners and would also satisfy the dual objective discussed in *Calbeck*: to assure that longshoremen are protected by some compensation law and to eliminate uncertainty as to the scope of coverage of the federal Act.

## CONCLUSION

For all the foregoing reasons, the International Longshoremen's Association, AFL-CIO, respectfully submits that the judgments herein of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1968

NACIREMA OPERATING CO., INC. AND LIBERTY  
MUTUAL INSURANCE COMPANY,

Petitioners,

*v.*

WILLIAM H. JOHNSON, JULIA T. KLOSEK AND  
ALBERT AVERY,

Respondents.

JOHN P. TRAYNOR AND JERRY C. OOSTING,  
DEPUTY COMMISSIONERS,

Petitioners,

*v.*

WILLIAM H. JOHNSON, JULIA T. KLOSEK AND  
ALBERT AVERY,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FOURTH CIRCUIT

**BRIEF ON BEHALF OF AMERICAN TRIAL LAWYERS  
ASSOCIATION AS AMICUS CURIAE IN  
SUPPORT OF RESPONDENTS**

**American Trial Lawyers Association  
Admiralty Section**

**By: Paul S. Edelman**

PAUL S. EDELMAN,  
99 Park Avenue,  
New York, New York.

MU 7-8181

On the Brief

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**BRIEF ON BEHALF OF THE AMERICAN TRIAL  
LAWYERS ASSOCIATION**

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TO THE HONORABLE JUDGES OF THE COURT:

**CONSENT OF THE PARTIES**

All of the parties in these causes have given their written consent to the filing of this brief *Amicus Curiae*.

## Statement of Interest of the *Amicus Curiae*

The American Trial Lawyers Association, is a national bar association, consisting of more than 20,000 lawyers, primarily engaged in the practice of personal injury law. The Admiralty Section of this Association consists of a substantial number of attorneys and proctors who specialize in maritime personal injury law. These attorneys represent members of the merchant marine and other maritime workers who are engaged in a hazardous industry and are recognized as having a special status both by legislation and generally in the courts of the land. All of these maritime workers have a real and direct interest in the outcome of this appeal.

Said Association is vitally concerned in the final outcome of this case involving as it does a situation which may finally resolve the tortuous series of cases which have attempted for over a generation to make a clear line by which attorneys and injured maritime workers will know their rights. It is a question of serious importance since 25% of all longshoremen's injuries occur on docks and piers, and in most states the average compensation is but half the federal rate. Only a broad interpretation of the Federal Act will protect these men as Congress intended.

A resolution of the issues in this case will materially affect not only the financial plight of injured maritime workers, but is of paramount importance to hundreds of thousands of workers, to the admiralty bar, and to the

maritime industry generally. For the foregoing reasons it is respectfully prayed that this Honorable Court accept this brief *Amicus Curiae*.

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Chairman, Admiralty Section,  
American Trial Lawyers Association.



IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1968

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Nos. 528 and 663

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NACIREMA OPERATING CO., INC. AND LIBERTY  
MUTUAL INSURANCE COMPANY,

Petitioners,

*v.*

WILLIAM H. JOHNSON, JULIA T. KLOSEK AND  
ALBERT AVERY,

Respondents.

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**BRIEF OF THE AMERICAN TRIAL LAWYERS  
ASSOCIATION IN SUPPORT OF RESPONDENTS**

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**Questions Presented**

1. Whether an injury sustained by a longshoreman caused by ship's gear on a pier or dock over navigable waters is within the coverage of the Longshoremen's and Harbor Workers' Compensation Act.
2. Whether the Longshoremen's Act is operable to the widest extent of federal concern and power.

3. Whether coverage in this case will present problems in applying the Longshoremen's Act in other cases, or will provide a logical and certain rule of law with justice.

### Statement of the Case

Rather than repeat an extensive Statement, Amicus American Trial Lawyers Association will adopt Petitioners' statement as it appears in their Petition for a Writ of Certiorari, and in the Opinion of Circuit Judge Sobeloff below.

Suffice it to say that Johnson and Klosek were members of a longshore gang and were injured on a gondola car on a pier while loading steel beams aboard ship. The vessel's cranes picked up a draft which swung when raised, and caused injuries to both and from which Klosek died.

Avery was also aboard a gondola car on a pier and was injured by a swinging draft hooked to a ship's gear.

It was stipulated that the piers in question were over water and high enough to permit barges and small boats under them. The injuries occurred several hundred feet from land.

This Court is being called upon to settle the issue as to whether the Longshoremen's Act is applicable to accidents within Congressional power over admiralty and maritime accidents. In addition, this Court is being asked to decide whether the Longshoremen's Act and Congressional power is co-extensive with maritime contracts and interstate commerce powers thereby including an injury to a longshoreman by ship's equipment on a dock erected over navigable water.

It has been statistically demonstrated that about 25% of all injuries to maritime employees occur on docks and piers while ships are being loaded, unloaded, or repaired.

Awards under the Federal Act are typically twice the amount given under most state acts.

To overturn the decisions below is to withdraw a significant number of maritime accidents from the reach of federal concern contrary to the intent of the Congress.

### **I. The Longshoremen's Act Extends To The Limit Of The Admiralty Jurisdiction And Congressional Power.**

A review of the Supreme Court decisions since *Southern Pacific Co. v. Jensen* (1917), 244 U. S. 205 leads to the analysis that the Longshoremen's Act fulfills the Federal concern to the limit of Congressional power.

*Jensen* limited a state's power to the water's edge; a state compensation act was held inapplicable to an injury and death on a gangplank. However, *Jensen* (at p. 217) makes it clear that the Federal jurisdiction does not begin at the water's edge. The decision states without equivocation that there is Federal concern for any stevedoring activity; it involves a maritime contract of employment; by its very nature it is a maritime engagement; it affects "navigation between the states and with foreign countries . . .".

Thereafter commenced the series of cases to limit the rigidity of *Jensen* by establishing a rule of "local" concern to allow a state compensation act to apply to certain maritime injuries. But these cases were not limitations on Federal power which at the time was not exercised.

It was in this context that the Longshoremen's Act was debated and passed by Congress. Thereafter, the jurisdiction of admiralty was clarified by passage of the Extension in Admiralty Act; not to create new causes of action but to make American admiralty practice clearly in accord with the law of England and other foreign countries.

Even before the passage of the Extension in Admiralty Act in 1948, the Supreme Court had determined that the maritime jurisdiction would reach dock areas where maritime personnel was injured in activities related to a vessel.

In *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U. S. 36, decided in 1943, a crew member was injured while a repair was being made on a connection to a land pipe, used in discharging a ship's cargo. The injury occurred on "land" but the seaman recovered under the Jones Act against his employer.

More recently, this Court has acknowledged in *Calbeck v. Travelers Insurance Co.* (1962), 370 U. S. 114 that in passing the Longshoremen's Act, "Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject matter", and that "... Congress intended the compensation act to have a coverage co-extensive with the limits of its authority".

*Calbeck* dealt with the application of the Federal Act to a welder engaged in "new" ship construction, as opposed to the suggested exclusive remedy of state compensation. The Court cited extensively language from *DeBardeleben Coal Corp. v. Henderson* (5th Cir. 1944), 142 F. 2d 481, at page 130 of 370 U. S.

The wide application of the rule that the Longshoremen's Act is co-extensive with federal maritime jurisdiction is underlined by *Boston Metals Co. v. O'Hearne*, D. C. Md. Adm. #4412, unreported opinion, June 20, 1963, aff'd (4th Cir. 1964) 329 F. 2d 504, cert. den. 379 U. S. 824. In that case a widow of a welder who was killed on a decommissioned hulk was held entitled to collect under the Act. The hulk was fast aground and in the process of being scrapped. District Judge Winter in the unreported opinion to this case stated:

"I think the *Calbeck* case equates, I think the legislative history (of the Longshoremen's Act) supports,

and I think the decisions in this Circuit also support the concept that *navigable waters* of the United States means the *admiralty jurisdiction of the United States, wherever it may be from time to time.*

\* \* \* I think that the *Calbeck* case makes perfectly plain that the application of the Longshoremen's and Harbor Workers' Act was not to be frozen to the admiralty jurisdiction of the United States as it then existed in 1927 or as it was considered then to exist but that rather there may be read into the Longshoremen's and Harbor Workers' Act a more flexible concept that under subsequent legislation or, as a result of subsequent court decisions, the admiralty jurisdiction of the United States is being expanded and the application of the *Longshoremen's and Harbor Workers' Act* expands along with it."

As the opinion of Circuit Judge Sobeloff indicated below, the *Calbeck* case dealt specifically only with the phrase of the Longshoremen's Act, precluding federal coverage where a state act could validly apply. But the language of *Calbeck* and its philosophy make broad federal coverage an underlying purpose of the Longshoremen's Act and is the only interpretation consistent with the application as intended by Congress.

At pages 126 and 127 of *Calbeck*, the Court stated:

"Congress brought under the coverage of the [federal] Act all such injuries [i.e., on navigable waters] whether or not a particular one was also within the constitutional reach of a state workmen's compensation law."

In *Holland v. Harrison Bros. Drydocks, etc.* (5th Cir. 1962), 306 F. 2d 369, 373, footnote 4 states that not only the locality is important but also "the nature of the work".

The footnote further states:

“• • • The literal language of the Longshoremen's Act seems to concern only the locality of the accident, but the history of the Act indicates that its *underlying purpose* was to *embrace the admiralty jurisdiction whatever that might be.*” (Emphasis added.)

Once accepting this clear proposition, it is only necessary to establish how far “ashore” the admiralty jurisdiction extends.

By statute, the Admiralty Extension Act, 46 U.S.C., Sec. 740 (1948), provides:

“The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable waters, notwithstanding that such damage or injury be done or consummated on land.”

The meaning of “caused by a vessel on navigable waters” has authoritatively been held to mean that even a dockside injury is covered by maritime law where the injury arose out of some “service to the ship”.

The Supreme Court so held in *Gutierrez v. Waterman Steamship Co.*, 373 U. S. 206 (1963), and rejected the contention that the injury must be caused by the vessel or ship's appurtenances. In *Gutierrez*, a longshoreman was injured on a wharf when he slipped on beans that had spilled out of bags being unloaded from the vessel, and the Court held that this dockside accident was within the maritime jurisdiction and subject to the doctrine of unseaworthiness.

Justice White, speaking for the Court made it clear that the impact on dockside was within the ambit of maritime

jurisdiction because of the Extension of Admiralty Jurisdiction Act, and stated:

“Respondent contends that it is not liable at least in admiralty, because the impact of its alleged lack of care or unseaworthiness was felt on the pier rather than aboard ship. Whatever validity this proposition may have had until 1948, the passage of the Extension of Admiralty Jurisdiction Act, 62 Stat. 496, 46 U.S.C., Sec. 740, swept it away. \* \* \*”

From *DeleBardelben* to *Calbeck* to *Gutierrez*, it is demonstrated that the Longshoremen's Act is co-extensive with admiralty jurisdiction, and that admiralty jurisdiction extends even to dockside where a worker is injured because of an activity related to a vessel and particularly when caused by direct contact with a vessel or its appurtenances.

This Court has never expressly held that a pier injury is cognizable under the Longshoremen's Act. The closest case—and one of the most brilliant decisions in the field—is *Michigan Mutual Liab. Co. v. Arrien*, 233 F. Supp. 496 (S.D.N.Y., 1964), aff'd (2d Cir. 1965) 344 F. 2d 640, cert. den. 382 U. S. 835. The facts of this case are of paramount importance because, in some quarters, they have been misconstrued.

“At the time of the accident, he was working on a ‘skid’—a removable platform approximately six by ten feet—which was attached to the dock. It extended out over the water and towards the ship some twenty to twenty-five feet below the deck, its outer edge short of the side of the vessel. The skid was necessary because the stringpiece of the dock was too narrow. . . .

“The skid was attached to the pier by two overhead cables, extending from the superstructure of the pier to its offshore corners. The onshore side of the

skid was secured to the stringpiece of the dock by three angle irons affixed to the stringpiece." (497)

The skid extended the working surface of the pier. In no sense was it a gangway or gangplank. It did not enable passengers, longshoremen or other workmen to go back and forth between the pier and the ship. It was exclusively an extension of the pier, and not of the ship.

The jurist epitomized the basis for his upholding an award under the Act in favor of a longshoreman injured while working on the skid in this one pregnant sentence:

"It thus appears that 'upon the navigable waters' is to be equated with 'admiralty jurisdiction.' " (501)

In commenting on the Admiralty Extension Act, he observed, 502:

"The basis upon which the Extension Act and the Longshoremen's Act rest is the same—the admiralty jurisdiction of the United States; and both Acts must be understood to have expanded *pari passu* with it. Any departure from this view would compel the conclusion that the Longshoremen's Act was to be frozen to the admiralty jurisdiction of the United States as it was understood at the time of its enactment in 1927, a view rejected by the Supreme Court in the *Calbeck* case by clear implication."

Another case underscoring the expansive influence of the Admiralty Extension Act upon not only traditional Admiralty concepts but also on the Longshoremen's and Harbor Workers' Act is *Interlake Steamship v. Nielsen*, 338 F. 2d 879 (6th Cir., 1965), cert. den. 381 U. S. 934. A shipkeeper drove his car off the end of the dock where his vessel was berthed and died of a fractured skull sustained on impact with the frozen waters of Lake Erie. The widow was granted an award by the Deputy Commissioner but had



it taken away by the District Court. The Court of Appeals reversed and reinstated the benefits.

Judge Edwards wrote:

"While the Admiralty Extension Act of 1948 obviously was not designed directly to affect the Longshoremen's and Harbor Workers' Compensation Act, it did serve to make clear that admiralty jurisdiction could extend to damage caused on land by maritime events, although early case law had held to the contrary. (See *Cleveland Terminal & Valley R.R. Co. v. Cleveland Steamship Co.*, 208 U. S. 316 (1908); *State Industrial Commission of New York v. Nordenholt Corp.*, 259 U. S. 263 (1922))" (882), and also:

"It seems obvious to us that the trend of case law, the impact of the Admiralty Extension Act, and the effect of *Calbeck* have all pointed in the direction of expanding the boundaries of admiralty jurisdiction toward land." (882)

Very soon after its enactment, the Admiralty Extension Act was considered to be a clarification of jurisdiction which had always existed, although not always exercised.

*Strika v. Netherlands Ministry*, 185 F. 2d 555, 558 (2d Cir., 1950), cert. den. 341 U. S. 904.

The Act was even applied retroactively. *U. S. v. Matson Nav. Co.*, 201 F. 2d 610, 614 (9th Cir., 1953) (property damage to a federally owned dike).

The reasoning above has allowed recovery for seamen ashore when injured in the service of the ship under the Jones Act.

In *O'Donnell v. Great Lakes Dredge and Dock Co.* (1943), 318 U. S. 36, a seaman was injured on land during the repair on a gasket connection to a land pipe used in discharging a ship's cargo.

A handyman who assisted in navigation of a dredge was injured in a shed on shore due to an explosion in a coal stove while he was placing lamps from the dredge in the shed. Recovery was sanctioned under the Jones Act in *Senko v. LaCrosse Dredging Corp.* (1927), 352 U. S. 370.

The most far-reaching case is, of course, *Hopson v. Texaco, Inc.* (1966), 15 L. Ed. 2d 740. In that case two ill seamen in a foreign port were being taken to the United States consul in a taxi cab procured by the ship's master. The cab driver was in a collision, through his negligence. One seaman was killed and one was injured. The taxi service was held to be an "agent" of the shipowner, and recoveries were allowed against the shipowner under the Jones Act.

Accord:

*Voris v. Eikel* (1953), 346 U. S. 328.

In addition, we have the long and still vital history of the "Twilight Zone" cases before us. Ever since 1942 in *Davis v. Department of Labor and Industries*, 317 U. S. 249, the Supreme Court has held that wherever there is doubt in applying state as opposed to federal compensation acts in maritime situations, the *tribunal chosen by the claimant* has a presumption of valid jurisdiction. *Davis* states:

" . . . the line separating the scope of the two being undefined and undefinable with exact precision, marginal employment may, by reason of particular facts, fall on either side."

*Davis* has been interpreted as " . . . a revolutionary decision deemed necessary to escape an intolerable situation and as designated to include within a wide circle of doubt all water front cases involving aspects pertaining both to the land and to the sea where a reasonable argument can be made either way . . ."

*Moore's* case (Sup. Mass., 1948), 323 Mass. 162, 167, 80 N. E. 2d 478, 480, aff'd (1948), 335 U. S. 874, *sub nom. Bethlehem Steel Co. v. Moore's*.

The *Calbeck* case (1962), 370 U. S. 114, still makes clear that in any doubtful area the claimant may elect his remedy, and that the Twilight Zone rule still holds.

Respondents would undo all the practical solutions brought forward by the *Davis* case, and applied since 1942.

## **II. The Longshoremen's Act Applies To Maritime Contracts Of Employment On Man-Made Structures On Or Above Navigable Waters.**

Admiralty jurisdiction extends to all damage or injury occurring during the performance of a maritime contract, including contracts of ship loading and unloading and repair, even though the injury involves piers and wharves over navigable waters.

As indicated in Point I, it is the contractual maritime jurisdiction which allows Jones Act recovery for crew members injured ashore through the negligence of their employer or agents of the employer and for unseaworthiness recoveries by longshoremen injured on docks.

The Longshoremen's Act is based on the New York Workmen's Compensation Act. Because the New York Act regulates the employment contract, it even applies to employees injured in other states so long as New York has an interest in the employment contract.

*Baduski v. S. Gumpert Co., Inc.*, 277 App. Div. 591, 102 N.Y.S. 2d 297, App. diss. 302 N. Y. 702.

Cases in Point I demonstrate the applicability of land-based injuries in conjunction with repair work on drydocks and adjacent land areas. These cases apply to the case at bar since a pier over water is even more "maritime"

than land areas near marine railways. Application of the Longshoremen's Act is more apt for areas "over" water than land areas for which relief has been granted.

An accident on a pier or dock built above navigable water is "upon" navigable waters.

As demonstrated above, the Supreme Court has allowed recovery under maritime law for injuries caused by unseaworthy vessels and appurtenances where the impact is on a dock "not remote" from the offending cause (*Gutierrez*).

The same grant of power to Congress by the Constitution delimits the reach of the Jones Act and the Longshoremen's Act. Where an injury occurs because of a vessel-connected activity the scope of both these federal statutes extends and grants a remedy.

Since the Supreme Court has seen fit to allow damage actions under maritime law for dock injuries, there is no impediment for the application of the Longshoremen's Act to the same injuries.

The so-called dry-dock cases reenforce the admiralty jurisdiction over land areas involving maritime pursuits; the federal Act has been applied universally.

Maritime workers injured on a "drydock" are specifically covered by the Longshoremen's Act as well as those who work at least in part upon navigable waters.

33 U.S.C., Sec. 902(4); 903(a).

A "drydock" included a marine railway whereby a vessel is drawn from the water onto land.

*Avondale Marine Ways, Inc. v. Henderson* (1953), 346 U. S. 366.

To make this meaningful, the land adjacent to a marine railway is within the geographical and functional scope of

the Longshoremen's Act. This has been the consistent view of the Court of Appeals.

*Holland v. Harrison Bros. Drydock etc.* (5th Cir. 1962), 306 F. 2d 369, 372, and *Maryland Casualty Co. v. Lawson* (5th Cir. 1939), 101 F. 2d 732, 733, cited with approval in the *Avondale Marine Ways* case.

A "building way" injury has also been held covered by the Longshoremen's Act. A building way is on land and used for new ship construction, but the outermost end extends into the water for the launching of a completed vessel. The "building way" was held to be sufficiently within the term "dry dock" to allow recovery for a workman under the Longshoremen's Act in *Port Houston Ironworks Inc. v. Calbeck* (S. D. Tex., 1964), 227 F. Supp. 966.

A dock or pier is demonstrably within the admiralty jurisdiction when a maritime worker is injured by ship's equipment. This is a reasonable and common-sense approach.

"A wharf is a structure on the margin of navigable waters, alongside of which vessels can be brought for the sake of being conveniently loaded or unloaded. Hence waters of sufficient depth to float vessels is an essential part of every wharf. *A wharf cannot be defined or conceived except in connection with adjacent navigable waters.*" (Emphasis supplied.)

*Langdon v. City of New York* (1883), 93 N. Y. 129, 151.

Compensation acts in general, and the Longshoremen's Act in particular are to be liberally construed in favor of coverage.

Many decisions involving the Longshoremen's Act discuss this principle of statutory construction. *Reed v. The Yaka* (1963), 373 U. S. 410, restates this proposition:

"We have previously said that the Longshoremen's Act must be liberally construed in the conformance

with its purpose, and in a way which avoids harsh and incongruous results."

The federal interest in piers and docks is also shown by the fact that piers and wharves must be recommended and approved by federal authorities. Title 33, Section 403, makes it unlawful to build any "wharf, pier . . ." except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army. Section 406 establishes substantial fines (up to \$2,500) and/or imprisonment for violations.

The section prohibits "any obstruction" which is not authorized "to the navigable capacity of any of the waters of the United States . . .".

The national concern is with the effects of structures on navigable waters, and not only on the objects navigating in the waters.

A federal interest in navigable waters is not withdrawn by placing man-made structures on or over such waters.

*United States v. Appalachian Power Co.* (1940), 311 U. S. 377, 408, 409.

*Economy L. & P. Co. v. United States* (1921), 256 U. S. 113, 118, 124.

Impact on a dock or pier has been the basis for recovery under the federal Longshoremen's Act where the employee was thereafter propelled into the water.

*Interlake S.S. Co. v. Nielsen* (6th Cir. 1964), 338 F. 2d 879, cert. den. 381 U. S. 934.

*Michigan Mutual Liability Co. v. Arrien* (2d Cir. 1965), 344 F. 2d 640, cert. den. 382 U. S. 835 (injury on a "stage" of skids extending over the water).

The mere fact that the injured party subsequently went into the water should not be decisive of coverage of the

Act where the initial injury was on the dock or pier; if the injury was in maritime employment when it occurred on the pier in these cases it should also be applicable to the case at bar.

If on the other hand an artificial distinction is made between what is "on" and what is "over" navigable water then airplane accidents would be excluded from coverage by the Death On The High Seas Act. But in all logic, such deaths including explosions in airplanes in flight and the like are covered by the Death On The High Seas Act.

*D'Aleman v. Pan American World Airways* (2d Cir. 1958), 259 F. 2d 493.

The word "upon" is susceptible of an interpretation which not only means "on" but "over" and "above". National policy has been established concerning structures which are "over" and "above". A remedial statute which has been construed to go to the limits of federal concern would by both purpose and common sense make the Longshoremen's Act applicable to the situation in this case.

In the cases at bar, the facts support the broad view of national interest. The areas below the piers in question here were in fact navigable by boats and by any reasonable standard the piers were over, above, or if you will "on" navigable water. They certainly were over water which had once been and in the future could be open to all types of navigation.

This Court has never definitively decided that an injury on a man-made structure adjacent to ship loading activity is precluded from recovery under the federal Act. It is respectfully submitted that the legislative history of the Act sought this application; it is consistent with the jurisdiction of the Congress over such activities, and the Act presumes coverage of the Act in a borderline activity (Sec. 920).

The decision below (footnote 7) in discussing the legislative history of the Act makes it clear that the House

thought it was meant to cover all maritime workers within the federal jurisdiction. The Senate Report mentioned is more restricted in its language; but it alludes to a mistaken idea of what the maritime jurisdiction even then entailed. The Senate's wording mistakenly assumes that the *Jensen* case limited federal maritime jurisdiction to the water's edge. As Point I illustrates, *Jensen* attempted to limit a *state's* power to the water's edge but not federal power.

The legislative history of the Act in 1926 and 1927 indicates that maritime coverage was the purpose of the Act, and that the Act was to be applied as far ashore as the maritime activity itself extended. If navigable waters are involved in a broad, common-sense definition, the employee has an election to come under the federal Act.

*Calbeck v. Travelers Ins. Co.* (1962), 370 U. S. 114.  
*Holland v. Harrison Bros. Dry Dock, etc.* (5th Cir. 1962), 306 F. 2d 369, 372, 373.

From the very beginning of the controversy over federal and state jurisdiction in *Southern Pacific Co. v. Jensen* (1917), 244 U. S. 205, 217, it was made clear that a maritime worker whose "employment was a maritime contract" and who received maritime-connected injuries was within the federal concern. See also *Atlantic Transport Co. v. Imbrovek* (1914), 234 U. S. 52, 62.

As indicated in Point I, both the *Jensen* case and *O'Donnell*, decided *prior* to the Admiralty Extension Act allow federal laws to be applied ashore. The maritime law for instance, from its earliest beginnings, provided maintenance to crew members and had other applications divorced from restricted notions of a vessel's location afloat.

As stated in *O'Donnell* (pp. 42, 43):

"The right of recovery in the Jones Act is given to the seaman as such, and, as in the case of maintenance



and cure, the admiralty jurisdiction over the suit depends not on the place where the injury is inflicted but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters.”

In *O'Donnell*, the seaman was on shore when he was injured.

*Swanson v. Marra Bros., Inc.*, 328 U. S. 1, does discuss the federal Act and its legislative history, but the thrust of the decision is merely to clarify (1) that the Jones Act was not to be applied to a longshoreman who was not a member of a ship's crew, after passage of the Longshoremen's Act, and (2) that a state compensation remedy would lie for injury to a longshoreman for “land torts”. But in fact, the Court was not asked to pass upon the question whether a longshoreman injured on a pier could *elect* federal over state compensation rights.

Waterfront workers injured by shore-based equipment used to load and unload ships are covered by a warranty of seaworthiness. This was so held in *Huff v. Matson Navigation Co.* (9th Cir. 1964), 338 F. 2d 205, cert. den. 380 U. S. 943; *Spann v. Lauritzen* (3rd Cir. 1965), 344 F. 2d 204, cert. den. 382 U. S. 1000, and *Deffes v. Federal Barge Lines, Inc.* (5th Cir. 1966), 361 F. 2d 422.\* *Deffes* so held because (p. 425):

“Loading and unloading is clearly held to be ‘work of the ship's service’”, citing *Seas Shipping Co. v. Sieracki* (1946), 328 U. S. 85, 89; *Crumady v. The Joachim Hendrik Fisser* (1959), 358 U. S. 423, 427 and *Italia Societa v. Oregon Stevedoring Co.* (1964), 376 U. S. 315, 323.

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\* A contrary result was decided in the Sixth and Second Circuits.

All federal rights including federal compensation rights should logically be given to those injured by ship's equipment while working in the ship's service.

### III. Application Of The Longshoremen's Act To The Situation At Bar Would Apply A Maritime Remedy To Men Injured By Ship's Gear on Structures Over Water.

Affirmance of the Court below need not create paradoxes in applying the Longshoremen's Act nor open up new areas of controversy.

The cases here can be affirmed on a rather narrow ground. All the employees were injured by ship's gear while serving the ship, and all were on areas constructed over the navigable waters.

Affirmance need not lead to a ruling that all injuries even by men not serving a ship must be covered by the federal Act if it occurs on land areas adjacent to water or on a pier. The Court could deny a very general application and still apply the federal Act to the cases before it on the facts here presented.

In twilight areas, the law still has elasticity enough to protect a claimant from being the victim of uncertainty.

An affirmance would also bring justice in cases where the federal Act had been held inapplicable, we believe, improperly. For instance, in *Travelers Insurance Co. v. Shea*, 382 F. 2d 344 (5th Cir. 1967), cert. den., *sub nom. McCullough v. Travelers Insurance Co.*, 389 U. S. 1050, a worker was injured on a floating work barge which rose and fell with the movement of the waters and which was adjacent to and a necessary part of a floating drydock. The Circuit Court felt impelled to rule these floating barges an extension of land, and denied federal coverage.

The Longshoremen's Act was not passed to create an iron-clad boundary between state and federal territory. The Act's passage was meant to do away with the need to decide the boundaries of power. *Calbeck* discussed this and reiterated the *Davis* case policy of a Twilight Zone allowing overlapping coverage so that a claimant need not elect between remedies at his peril. (*Calbeck*, p. 128, citing *Davis v. Department of Labor & Industries*, 317 U. S. 249.)

Respectfully submitted,

AMERICAN TRIAL LAWYERS ASSOCIATION,

By Paul S. Edelman,  
Attorney for *Amicus Curiae*,

Dated at New York, New York, this 5th day of March,  
1969.

**Certificate.**

This is to certify that on the            day of March, 1969, copies of the above *amicus curiae* brief were served by mail on Hon. Erwin C. Griswold, Solicitor General, United States Department of Justice, Washington, D. C. 20530; Randall C. Coleman, Counsel for Petitioner, Nacirema Operating Co., Inc., 1600 Maryland National Bank Building, Baltimore, Maryland 21202; William B. Eley, counsel for Petitioner, Liberty Mutual Insurance Company, 1000 Maritime Tower, Norfolk, Virginia 23514; E. D. Vickery, Royston, Rayzor & Cook, 877 San Jacinto Building, Houston, Texas 77002, and Francis A. Scanlan, Kelly, Deasey & Scanlan, 926 Four Penn Center Plaza, Philadelphia, Pennsylvania, counsel for National Maritime Compensation Committee; Ralph Rabinowitz, 1224 Maritime Tower, Norfolk, Virginia 23510, counsel for Respondent Albert Avery; John J. O'Connor, Jr., The Law Building, 425 St. Paul Street, Baltimore, Maryland 21202, counsel for Respondents William H. Johnson and Julia T. Klosek.

PAUL S. EDELMAN.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1969

No. 9

NACIREMA OPERATING CO., INC. AND LIBERTY  
MUTUAL INSURANCE COMPANY,  
*Petitioners,*

v.

WILLIAM H. JOHNSON, JULIA T. KLOSEK,  
AND ALBERT AVERY,  
*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE FOURTH CIRCUIT

**SUPPLEMENTAL BRIEF FOR PETITIONERS**

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September 10, 1969

IN THE  
**Supreme Court of the United States**

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OCTOBER TERM, 1969

---

**No. 9**

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**NACIREMA OPERATING CO., INC. AND LIBERTY  
MUTUAL INSURANCE COMPANY,**  
*Petitioners.*

v.

**WILLIAM H. JOHNSON, JULIA T. KLOSEK,  
AND ALBERT AVERY,**  
*Respondents.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE FOURTH CIRCUIT

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**SUPPLEMENTAL BRIEF FOR PETITIONERS**

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**Discussion of Recent Decision (*Rodrigue v. Aetna  
Casualty & Surety Co.*, 395 U.S. 352)**

This cause was argued on March 25, 1969, and reargument has been ordered by the Court.

Since the initial argument the Court's decision has been announced in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), which held that Congress had adopted state law, not federal law, for civil actions involving wrongful deaths of workers employed on artificial island drilling rigs located on the outer continental shelf.<sup>1</sup>

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<sup>1</sup> Federal law, the Death on the High Seas Act, c. 111, 41 Stat. 537, 46 U.S.C. §§ 761-768, would have limited recovery to pecuniary loss. State law, Article 2315 of the Louisiana Revised Civil Code, which was held to have been adopted as federal law for such cases by virtue of the Outer Continental Shelf Lands Act, c. 345, 67 Stat. 462, 43 U.S.C. §§ 1331, *et seq.*, was more generous to the plaintiffs.

Although the Longshoremen's and Harbor Workers' Compensation Act was not directly involved in *Rodrigue*,<sup>2</sup> the traditional principle that pier injuries are divorced from admiralty jurisdiction (absent a statute) was clearly recognized by the unanimous opinion of the Court. In concluding that the Death on the High Seas Act did not apply to *Rodrigue*-type accidents, Mr. Justice White succinctly stated that "the accidents had no more connection with the ordinary stuff of admiralty *than do accidents on piers*,"<sup>3</sup> and "would be no more under admiralty jurisdiction than accidents on a wharf *located above navigable waters*"<sup>4</sup> (emphasis supplied). We think that this Court's recognition of the sharp line which has historically been drawn between piers and other land-based injuries, and admiralty jurisdiction, as is manifest in the above language, emphasizes the fact that Congress understood and intended that pier injuries were beyond the coverage of the Longshoremen's Act.

Respectfully submitted,

RANDALL C. COLEMAN,

WILLIAM B. ELEY,

Counsel for Petitioners.

September 10, 1969

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<sup>2</sup> It is noteworthy, however, that in Section 4(c) of the Outer Continental Shelf Lands Act, c. 345, 67 Stat. 462, 43 U.S.C. 1333(c), Congress expressly extended the benefits of the Longshoremen's Act seaward to encompass workers engaged in the natural resources effort on the continental shelf. Conversely, although it has thus expressly extended the Longshoremen's Act seaward and has applied the Act to other areas such as defense bases, Congress has never extended the Act ashore so as to include accidents on piers.

<sup>3</sup> 395 U.S. at 360.

<sup>4</sup> 395 U.S. at 366.

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*Respondents.*

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JOHN P. TRAYNOR AND JERRY C. OOSTING,  
DEPUTY COMMISSIONERS,  
*Petitioners,*

v.

WILLIAM H. JOHNSON, JULIA T. KLOSEK  
AND ALBERT AVERY,  
*Respondents.*

---

**SUPPLEMENTAL BRIEF FOR RESPONDENTS**  
**WILLIAM H. JOHNSON and**  
**JULIA T. KLOSEK**

---

**Developments Since Cases Were Argued**

Following the argument of these consolidated cases on March 25, 1969, there have been some developments the parties deem of sufficient importance to bring to the atten-

tion of the court. In their Supplemental Brief the Petitioners cited *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, which will be commented on at the end of this section of our Brief.

Recently, a very scholarly law review article was published in Volume 3 of the Georgia Law Review, captioned "Dockside Injuries Under the Longshoremen's and Harbor Worker's Compensation Act". The exhaustive treatment runs from page 622 to 642 and is documented with 122 footnotes. Although the article is uniformly excellent, the Court's attention is particularly directed to subcaptions II. "The Act and Its Legislative History", pp. 622-629, and IV. "Modern Approaches to the Act's Jurisdiction", pp. 635-640.

Its appraisal of the legislative history of the Act is contained in this sentence:

"Although it should be clear that purely onshore injuries are excluded from compensation under the Act, a careful reading of the **legislative history casts doubt** on the traditional judicial view that *pierside injuries to maritime workers* who must continually **pass between pier and vessels** were also intended to fall outside the purview of the Act" (p. 625).

The final paragraph of the article reads:

"Despite lack of express Congressional recognition of compensation for dockside injuries, continued judicial **adherence to the rigid situs theory** is in itself **inconsistent with the basic purposes** of the Longshoremen's Act. The Supreme Court is now presented with an opportunity to clarify and resolve the inconsistencies created by the ambiguous language in the Act. By construing the Act as covering dockside injuries, the Court would make a substantial advance towards abolishing the **unrealistic distinction** between admiralty contract (status) jurisdiction and tort (situs) jurisdiction."

To turn our attention to *Rodrigue, supra*, it should be emphasized that the issue in this and its companion case was which of two federal statutes controlled, the Death on the High Seas Act or the Outer Continental Shelf Lands Act which adopted, in part, state law. Both lower courts held the Seas Act offered the exclusive remedy; this court reversed. In reaching its disposition, the Court had occasion to cite excerpts from the legislative history of the Act, particularly the authoritative remarks of Senators Gordon and Ellender. In the original draft it was sought to treat the "platforms or artificial islands created in the water as ships". This approach was abandoned and the bill was rewritten deleting entirely the reference to treating the islands as vessels.

In the course of his opinion, Mr. Justice White adverted to the fact that the Louisiana State law was far more liberal to the widows and children — a recognition of this court's continuing solicitude for dependents of workmen killed in the course of their employment — and alluded to the Admiralty Extension Act and *Gutierrez v. Waterman S. S. Corp.*, 373 U.S. 206, which, under the facts, were held not to be applicable.

In the instant cases, the maximum recovery of the widow and minor children under the Federal Statute is far in excess of that allowable on the state side, \$63,000 vs. \$15,000. Additionally, we do not have two federal statutes vying against one another; the choice is between a state and federal remedy. As has been developed in our original Brief, the existence of a state remedy does not — nay can not — oust the federal government of its authority to legislate in the maritime field. Traditionally, drilling for oil has been a land based activity; traditionally, piers have been indispensable adjuncts of navigable waters and ships.

Since the instant cases were argued in the spring, the American Law Institute released its "Study of the Division of Jurisdiction Between State and Federal Courts". Appendix G, pp. 505-507, sets forth the French Marine Ordinance of August 1681 and the Royal Declaration of 1694, interpretative thereof. Paragraph 10 reads:

**"They (the Admiralty Judges) shall equally have jurisdiction of piracies, spoliation and desertions of crews, and generally of all crimes and wrongs committed upon the sea, its ports, harbors and beaches."**

The interpretative declaration reaffirmed the Ordinances of 1430, 1543 and 1681, all of which "assigned to the admiralty judges the **jurisdiction of all things whatsoever arising at sea and on the shores thereof**". The documents go on to declare that the admiralty judges shall have jurisdiction of civil matters **"including** those cases which may occur on the sea, the ports, harbors and beaches, and **upon the quays**, between all parties and private persons, without the said officers being troubled by our ordinary judges. . . ."

### **Some Further Observations on Legislative History**

Because of the court's interest in the legislative history in *Rodrigue* and during the initial argument in the instant cases, some additional comments may be in order. This subject was touched upon in our original Brief, pages 13-18; see also (typed) Appellant's Supplemental Brief in the Court of Appeals, pages 2-15. Senator Cummins while chairing the meeting of April 2, 1926, in speaking in favor of uniform rates for the longshoreman, remarked:

**"We have exactly the same thing in the federal compensation law. We do not make any distinction there in awarding compensation to a federal employee, determined by where he may be working or where she may be working"** (p. 46).

That Congress and the witnesses who appeared before it were desirous of making the coverage as comprehensive as possible is evident from this statement of Mr. O. G. Brown, a management attorney and a member of the balanced conference appointed to come up with a full coverage provision:

"Just in passing, I want to say that we are very uncertain about that coverage; and while we have tried to devise something that, in our minds, would make even more sure coverage than that . . ." (p. 77).

Senate Report No. 973, previously cited in the Briefs of both parties also contains this sentence:

"It thus appears that there is no way of giving to these hardworking men, engaged in a somewhat hazardous employment, the justice involved in the modern principle of compensation without enacting a uniform compensation statute."

On January 14, 1927, Congressman Graham submitted Report No. 1767 to the House. On page 19 he asserts:

"The Senate bill as reported by the committee will provide the benefits of workmen's compensation to practically all maritime workers within the admiralty jurisdiction. Workmen's compensation has come to be universally recognized as a necessity in the interest of social justice between employer and employee . . ."

The "practically all maritime workers" reflects his concern over excepting seamen from the coverage of the bill which omission was in deference to the demands of Andrew Furusuth who attended the hearings on behalf of the seamen's unions. The co-author of the bill was apprehensive this absence would destroy the uniformity his committee was seeking and thus invalidate the act. In participating in the animated debate when the bill was con-

sidered by the House on March 2, 1927, Congressman Graham said:

"Afterwards, when the Senate bill came to us, the question (seamen inclusion) was reopened and rediscussed, and under the dicta of the decisions of the Supreme Court it was felt that perhaps this very bill **might be imperiled if we did not have uniformity. That is what the judges have all cried for.** That is why they have declared unconstitutional in two cases acts of Congress attempting to give these laboring men compensation" (p. 5410).

At the argument on these cases this spring, the Court evinced an interest in the legislative history of the Admiralty Extension Act. As far as could be ascertained, there is no express reference to the Longshoremen's and Harbor Workers' Compensation Act therein. We do not deem this to have any particular relevance. This Court has held in several decisions that the views of a subsequent Congress or committee are not a part of the legislative of the Act under construction and are not a persuasive guide to the intent of the enacting Congress. *U. S. v. Philadelphia National Bank*, 374 U.S. 321, 348-349; *U. S. v. Wise*, 370 U.S. 405, 511, and *U. S. v. Price*, 361 U.S. 304.

Senate Report No. 1593, 80th Cong., 2d Sess., 1, 2 (1948) does, however, contain this pregnant quote:

"For example, if a bridge or pier, or any person or property situated thereon, is injured by a vessel, the admiralty courts of the United States do not entertain the claim for the damages thus caused. . . . The bill under consideration **would provide for the exercise of admiralty and maritime jurisdiction in all cases of the type above indicated.**"

### What is the Common Sense of the Situation?

In addition to being factually upon navigable waters, piers are their indispensable adjuncts. There is a veritable

tidal wave of navigable waters in these cases. The Solicitor General in his brief makes such a factual concession. The *Johnson-Klosek* Libels contain an allegation the injuries occurred "upon the navigable waters"; this fact was admitted by the Answers of Nacirema Operating Co., Inc. In the *Avery* case there is an express stipulation the pier involved was upon navigable waters. Finally, one of the factual findings of Deputy Commissioner Traynor in the *Johnson and Klosek* cases was that the pier was upon navigable waters.

The cliché "a pier is an extension of the land" is as inaccurate factually as it is historically. Logically and functionally a pier is an extension of the ship — an oversized gangplank. A pier cannot be conceived of except in connection with navigable waters and a ship. Servicing a vessel — facilitating the loading or discharging — is its *raison d'être*. In the words of *Johnson Co. v. Garrison*, 234 U.S. 251, 268, a 1914 decision, the mooring of a vessel is as necessary as their movement."

The U. S. District Court for the Southern District of California came to the common-sense conclusion that a pier is an extension of the ship in the immigration case of *U. S. v. Yee Nee How*, 105 F. Supp. 517 (1952).

At the time our judicial system was established by the Constitution, the waters of the Patapsco River, Sparrows Point, Maryland, were navigable waters. The erection of the finger type pier probably sometime in this twentieth century did not destroy the navigability of these waters and did not diversify the federal government of its dominion thereover. As was pointed out in our original Brief, page 23, "When once found to be navigable, a waterway remains so."

When these cases were originally argued, one of the justices asked counsel for the Respondents whether a long-



shoreman struck by the ship's gear in a situation similar to that in the instant cases, but actually knocked into the water would be covered by the Act; counsel conceded he would. This question was followed up with a query about a longshoreman being struck on the ship by the same gear and knocked onto the pier; again counsel for the Respondents admitted this injury would be covered. In response to a third question, this counsel replied that the jurisdiction of admiralty could be extended to include a pier injury.

We must assume that questions of a similar nature occurred to the practical-minded Congressman. It is a well recognized principle that all injuries within the scope of the risk are within the legislative intent. Certainly Congress, which was so concerned with "uniformity" didn't pass an act which gave the longshoreman only partial coverage and discriminated against the 25% of the gang which worked on the pier doing the same work, exposed to the same risks and receiving the same pay. As the Amicus Brief of the International Longshoremen's Association points out, the men shuttled back and forth in the course of their employment; this is even more true today with the emphasis on "roll on and roll off" cargo — a sort of automated return to the side hatch loading of Mr. Jensen's day.

Petitioners do not challenge the awarding of benefits to a longshoreman working on the pier who is lifted up and dropped back down on the pier, but demand their denial to his partner whose misfortune is to be knocked horizontally instead of being lifted vertically by something connected to the winch. Again, they would not complain about the granting of benefits to a harbor worker injured in a small boat under the pier involved in these cases; however, they strenuously object to the paying of an award to a longshoreman injured on the deck of the same pier.

The unsoundness of their contentions may appear in more convincing form in this hypothetical situation. The Classical Construction is engaged in Washington to erect a building. Some of its employees are working on the steel frame of the structure; others are down below on the adjacent sidewalk. A load of equipment being hoisted to an upper level breaks loose and falls. On the way down it strikes and kills an ironworker on the third floor; it continues its precipitous descent and kills a fellow ironworker performing his duties at that particular moment on the sidewalk. The employer and its carrier pay the widow of the employee killed while working on the third floor of the building, but balk about paying the same benefits to the widow of the co-worker crushed on the sidewalk maintaining she was restricted to lower compensation because her decedent was not in the building but on the adjacent sidewalk. This court would make a short shrift of such a groundless objection. If a compensation law did contain such a bizarre exclusion, it would probably be vulnerable to attack on the basis of a denial of the equal protection of the law.

The position contended for by the Petitioners in addition to being otherwise untenable, egregiously offends common sense. For the reasons developed in this Brief and the Briefs previously submitted in support of our position, we urge that the decision of the Court of Appeals be affirmed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that copies of the foregoing Brief were served on the following attorneys for all parties herein by mailing them, postage prepaid, on this 1st day of October, 1969:

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October Term, 1970

Nov. 9 and 16

MARINE OPERATING CO., INC. AND LIBERTY MUTUAL  
INSURANCE COMPANY, Petitioners,

v.

WILLIAM H. JOHNSON, JULIA T. KLOPFER  
AND ALBERT AVERY, Respondents.

JOHN P. TRAYNOR AND JERRY C. COFFIN,  
Deputy Commissioners, Petitioners,

v.

WILLIAM H. JOHNSON, JULIA T. KLOPFER  
AND ALBERT AVERY, Respondents.

PETITION FOR REHEARING

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---

**PETITION FOR REHEARING**

---

William H. Johnson and Julia T. Klosek, two of the Respondents herein, respectfully pray for a rehearing of the above-captioned cases, and for reasons say:



1. Reversing the award in favor of the Respondents on the grounds set forth in the opinion deprives them of the "Equal Protection of the Laws" guaranteed by the federal Constitution.

2. In reaching its disposition, this Honorable Court disregarded the reasoning and philosophy of the cases which should have controlled its decision, viz., *Avondale*, *Calbeck*, *Gutierrez*, *O'Donnell*, *Reed and Voris*, and erroneously construed others.

3. As to the Respondent Julia T. Klosek, the Court overlooked the fact that her decedent was lifted by the ship's crane and dropped to the deck of the pier — a factual situation entitling her to recovery under *L'Hote*, as explained by *The Admiral Peoples*.

4. The Court misinterpreted what it designated as the "*Jensen line*"; if such a thing as a "line" is required the traditional water's edge is a natural, functional and logical one.

5. The Court erred in assuming piers are "permanently affixed" to the shore; even were this assumption correct, neither the navigability of the waters thereunder nor the admiralty jurisdiction of the federal courts would be affected.

## ARGUMENT

### 1.

REVERSING THE AWARD IN FAVOR OF THE RESPONDENTS ON THE GROUNDS SET FORTH IN THE OPINION DEPRIVES THEM OF THE "EQUAL PROTECTION OF THE LAWS" GUARANTEED BY THE CONSTITUTION.

It must ever be kept uppermost in mind that these cases involve longshoremen members of a 16-man gang — a definite

work unit — (not individuals casually walking or driving by on a bridge) actively engaged in loading ocean-going freighters. Their duties, their rest periods, their lunch breaks required them to go back and forth between the vessel and the pier. They were doing the same work; they were receiving the same pay; they were exposed to the same risks; they were employed by the same corporation. They were, accordingly, entitled to the same equal protection of the law as were the fourteen other members of the gang.

The occurrence of the injury on the pier rather than on the ship or her gangway has no relation to the nature of the wrong inflicted on the employee or his dependents.

The Supreme Court has repeatedly pointed out that the doctrine of equal protection of the laws applies to the interpretation of federal statutes as part of the Fifth Amendment guarantee of due process of law. The Court has emphasized again and again that while the Fifth Amendment, unlike the Fourteenth, contains no explicit equal protection clause, it equally forbids "invidious discrimination" in federal legislation as a violation of due process. *Shapiro v. Thompson*, 394 U.S. 618, 641-642 (1969); *Schneider v. Rusk*, 377 U.S. 163, 168 (1964); *Bowling v. Sharpe*, 347 U.S. 497, 499 (1954). See also Justice Douglas concurring in *United States v. Seeger*, 380 U.S. 163, 188 (1965); Justice Black dissenting in *Griswold v. Connecticut*, 381 U.S. 479, 507 (1965), and *Pennsylvania R.R. Co. v. Day*, 360 U.S. 548, 554 (1959).

Equal protection of the laws secures every person "against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 352 (1918).

In interpreting and applying statutes, courts must regularly "prune" from a statutory provision any language which adopts "such invidious exceptions or limitations as violate equal protection." *Simpkins v. Cone Memorial Hospital*, 323 F. 2d 959, 969 (4th Cir. 1963), cert. den. 376 U.S. 938; *Quong Ham Wah Co. v. I. A. C.*, 184 Calif. 26, 192 Pac. 1021, 1027 (1920), error dism. 255 U.S. 445 (1921); *Demmert v. Smith*, 82 F. 2d 950, 951-952 (9th Cir. 1936); *Stagg, Mather & Hough v. Descartes*, 244 F. 2d 578, 582-583 (1st Cir. 1957); cf. *Lynch v. Overholser*, 369 U.S. 705, 710-711 (1962). So here, the courts should "prune from the statute" any implication that "upon navigable waters" does not include the deck of a pier "upon navigable waters", as well as the deck of a ship "upon navigable waters".

Mr. Justice Black touched upon this equal protection principle obliquely in the seaman's case of *Waldron v. Moore-McCormack Lines, Inc.*, 386 U.S. 724, 726 when he stated: "The basic issue here is whether there is any justification, consistent with the broad remedial purposes of the doctrine of unseaworthiness, for drawing a distinction between the ship's equipment on the one hand, and its personnel on the other."

Indeed, to ignore the statute's liberal term "upon the navigable waters" on the ground the deck of a pier although "upon the navigable waters" literally (see *Glad-den v. Stockard S. S. Co.*, 184 F. 2d 510, 512 (3 Cir., 1950)) does not satisfy the Act's jurisdictional requirement unjustly discriminates so as to deny one claimant — or the same claimant at different times, for that matter — the benefits of federal law and relegates him to the less favorable treatment of state law in violation of the constitutional requirement of equal protection of the laws. It involves an invidious and unjust classification which **discriminates**

unreasonably between persons sustaining similar injuries in similar situations upon totally irrelevant grounds.

It is submitted this is precisely what this Court had in mind when it asserted in *Reed v. SS YAKA*, 373 U.S. 410, 415:

"We have previously said the Longshoremen's Act 'must be **liberally construed** in conformance with its purpose, and in a way which **avoids harsh and incongruous results.**' . . . As we said in a slightly different factual context, 'All were subjected to the **same danger.** All were **entitled to like treatment** under law.' "

Coverage in the "drydock" cases has been uniformly applied with beneficent liberality. As far back as 1953 this Court in a 2-sentence Per Curiam Opinion affirmed an award for a death on the dry land transfer tracks of a marine railway 400 feet inland from the water's edge. (201 F. 2d 438, fn. 2) (There is, of course, no reference to a marine railway in the Act's language.) *Avondale Marine Ways, Inc. v. Henderson*, 346 U.S. 366, affirming 201 F. 2d 437 (5 Cir., 1953). The pier in the instant cases extended 500 feet out into and over the navigable waters of the Patapsco River.

In the 1937 case of *Maryland Casualty Co. v. Lawson*, 101 F. 2d 732, 733, the Fifth Circuit held adjacent land of a marine railway included in the coverage of the Act because "the land was part of the yard necessary to the operation of the marine railway." Isn't a pier just as "necessary to the operation" of a ship?

In 1951, Judge Soper of the Fourth Circuit, after reviewing the earlier decisions, warned against defeating the protective purposes of the Act by restrictive holdings and concluded "upon the navigable waters of the United States" should be broadly construed and the **coverage** of the Act

"should not be frustrated by needless refinements." *Newport News S. B. & D. D. Co. v. O'Hearne*, 192 F. 2d 968.

In the Fifth Circuit case of *Holland v. Harrison Bros. Drydock and Ship Repair Yard, Inc.*, 306 F. 2d 269, the court once more was dealing not with a standard drydock, but a marine railway located entirely on land. Judge Wisdom synopsisized the drydock company's position, 370:

"Harrison Brothers counters that when a worker is injured with both feet planted on dry earth (the factual situation involved) there is no federal coverage . . ."

In explaining its holding in favor of the injured workman, the court added, 372: "any meaningful definition of marine railway should include the land immediately adjacent." Similarly, any meaningful definition of "navigable waters" should include the piers immediately above them.

Finally, in *Travelers, Inc. Co. v. McManigal*, 139 F. 2d 949, 4 Cir., 1944, the court had before it a claim arising out of the death of a workman killed when he fell to the floor of the drydock during the course of its construction. Recovery was allowed, the court holding he was "constructively standing in navigable waters" at the time of the injury. "Navigable waters" were directly beneath Johnson and the decedent Klosek when the instant casualty occurred; they were actually — not constructively — "upon navigable waters".

This Court in *Voris v. Eikel*, 346 U.S. 328 (1953) unanimously admonished against interpreting the Act to bring about "harsh and incongruous" results. As a result of the decision in the instant cases, the state of the law is as follows:

Under the Longshoremen's Act, if the **same load** attached to the **same crane** involved in these proceedings struck the

same longshoreman during the course of his employment, the coverage would be as indicated:

1. In the hold	Covered
2. On deck	Covered
3. On the gangway	Covered
4. In a boat under the pier	Covered
5. In a boat alongside the ship	Covered
6. In a boat alongside the pier	Covered
7. Knocked from the ship to the pier	Covered
8. Knocked from the pier into the water	Covered
9. Lifted up and dropped back onto pier	Covered

There is recognized coverage under the Act for all nine of these factual situations. If, however, the longshoreman was struck on the pier and merely knocked horizontally — but not sufficiently far to fall into the water — the injury or death is not covered.

The harshness, the incongruity of this discrimination in an employer-employee oriented compensation statute is shockingly offensive to and violative of the equal protection of the laws requirement of the Constitution. There is no specific exclusion of pier side injuries in the Act. Congress did not intend such anomalies and such bizarre results — to perpetuate the hoax of a part-time act. Even if it did, such discrimination must fall before the majestic requirement of the equal protection of our laws.

## 2.

IN REACHING ITS DISPOSITION, THIS HONORABLE COURT DISREGARDED THE REASONING AND PHILOSOPHY OF THE CASES WHICH SHOULD HAVE CONTROLLED ITS DECISION, VIZ: *AVONDALE*, *CALBECK*, *GUTIERREZ*, *O'DONNELL*, *REED* AND *VORIS*, AND ERRONEOUSLY CONSTRUED OTHERS.

What might be said to be the precursor of this case was the seaman's claim in *O'Donnell v. Great Lakes Co.*, 318

U.S. 36 (1943). O'Donnell, a deckhand, filed suit under the Jones Act to recover for injuries sustained ashore while assisting in the repair of a gasket connection of a suction pipe being used to unload a cargo of sand from the vessel. The employer argued — as it did in the instant cases — that the employee was not covered under the maritime statute because the injury was sustained on land. Speaking for a unanimous court, Mr. Chief Justice Stone, held the injury covered and added, 39:

“Congress, in the absence of any indication of a different purpose, must be taken to have intended to make them applicable so far as the words and the Constitution permit, and to have given them the full support of all the constitutional power it possessed. Hence the Act allows the recovery sought unless the Constitution forbids it.”

The decision in the instant cases should be the same as that reached in *O'Donnell*, viz., that recovery is allowed unless the Constitution forbids it; there is no such ban disqualifying these claims.

*Avondale*, a 1953 decision of this Court, unanimously held an injury sustained 400 feet inland on a marine railway was compensable under a liberal interpretation of the word “drydock”. Since the law has been interpreted liberally with respect to the “drydock” test of jurisdiction, it should be interpreted just as liberally with reference to the “upon navigable waters” test of jurisdiction.

As Mr. Justice Brennan, the author of *Calbeck v. Travelers, Inc. Co.*, 370 U.S. 114 (1962) appreciated, the philosophy of this decision compels an affirmance of the instant cases. Inter alia, this forward looking opinion after reviewing earlier decisions and analyzing the “twilight zone” creation of this Court asserts:

“Our conclusion is that Congress invoked its constitutional power so as to provide compensation for all

injuries sustained by employees on navigable waters whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law" (117).

"The elaborate provisions of the Act, viewed in the light of prior Congressional legislation as interpreted by the Supreme Court, leaves no room for doubt, as it appears to us, that Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject-matter. . . ." (130; quoted with approval from *DeBardeleben Coal Corp. v. Henderson* (La.) 142 F. 2d 481, 483 and 484).

"In the application of the act, therefore, the broadest ground it permits of should be taken" (130; also with approval from *DeBardeleben*).

Neither the presence of a third party right nor the availability of a concurrent state remedy alluded to in a footnote of the opinion divests Congress of its authority to legislate in this field or the Longshoremen's Act of its broad maritime employment coverage.

The opinion in *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206 (1963) was written by the same Justice who authored the opinion in the instant cases. It is difficult, if not impossible, to reconcile the two decisions. *Gutierrez* dealt with a third party claim of a longshoreman injured on the pier some 100 feet or more from the side of a ship when he slipped on some beans which had spilled onto the pier from broken bags during the course of unloading. The opinion, representing the views of eight members of the court, asserted, 215:

"We . . . hold that the duty to provide a seaworthy ship and gear, including cargo containers, applies to longshoremen unloading the ship whether they are standing aboard ship or on the pier."

Similarly, the protection intended by the Longshoremen's Act should apply, whether the longshoreman engaged in



loading or unloading is "standing aboard ship or on the pier."

*Reed v. Steamship YAKA*, 373 U.S. 410 (1963), a third party action by a longshoreman, decided in favor of the longshoreman by a tally of 7 to 2, furnishes us with these pregnant quotes:

"But we cannot now consider the wording of the statute alone. We must view it in the light of our prior cases in this area . . . the holdings of which have been left unchanged by Congress" (414).

"We have previously said that the Longshoremen's Act 'must be liberally construed in conformance with its purpose, and in a way which **avoids harsh and incongruous results**. We think it would produce a harsh and incongruous result, one out of keeping with the **dominant intent of Congress to help longshoremen**, to distinguish between liability to longshoremen injured under precisely the same circumstances because some draw their pay directly from a stevedoring company doing the ship's service" (415).

"As we said in a slightly different factual context, '**All were subjected to the same danger. All were entitled to like treatment under law**'" (415).

The opinion in the instant cases relied very heavily on *Swanson v. Marra Bros., Inc.*, 328 U.S. 1 (1946) and, to a certain extent, on *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352. The reliance was misplaced. In the instant cases, the majority opinion stated that *Swanson* was an action under the Longshoremen's Act; that is an error — the longshoreman tried to recover by invoking the Jones Act, not the Longshoremen's Act. The express holding was that a longshoreman could not recover in a suit under the Jones Act. Were a longshoreman to institute a third party action today based on the facts of *Swanson* — a life raft came loose from its mooring, fell on and injured him on the

pier — he could recover. There is, admittedly, a dictum in *Swanson* about a pier being an extension of land.

It is interesting to note that the same term of court that produced *Swanson* also gave the admiralty bar *Seas Shipping Co. v. Sieracki*, 326 U.S. 85, the landmark case which held the seaworthiness doctrine applicable to longshoremen as well as seamen. In the slightly more than two decades it has been in the reports, *Sieracki* has become one of the most cited of maritime cases; *Swanson* has been relegated to the limbo of forgotten decisions.

*Rodrigue* is clearly distinguishable and should have no direct bearing on the disposition of the instant cases. The issue in *Rodrigue* and its companion case was which of two federal statutes controlled, the Death on the High Seas Act or the Outer Continental Shelf Lands Act which adopted, in part, state law. Both lower courts held the Seas Act offered the exclusive remedy; this Court reversed. The legislative history was crystal clear in *Rodrigue* — a provision in the original draft to treat the platforms as "ships" was completely eliminated.

Traditionally, drilling for oil has been a land based activity; traditionally, piers have been indispensable adjuncts of navigable waters and the ships they serve. In recognition of this Court's continuing solicitude for dependents of workmen killed in the course of their employment, Mr. Justice White adverted to the pro-workman economic consideration the Louisiana State Law was far more liberal to the widows and children. The converse is true in the instant cases; the state remedy is poverty oriented.

## 3.

AS TO THE RESPONDENT JULIA T. KLOSEK, THE COURT OVERLOOKED THE FACT THAT HER DECEDENT WAS LIFTED BY THE SHIP'S CRANE AND DROPPED TO THE DECK OF THE PIER — A FACTUAL SITUATION ENTITLING HER TO RECOVERY UNDER *L'HOTE*, AS EXPLAINED BY *THE ADMIRAL PEOPLES*.

In its opinion, this Court failed to differentiate between the claims of Julia T. Klosek, widow of Joseph J. Klosek, and those of the other two Respondents. In the other claims, the surviving longshoremen were crushed against the side of the gondola car. Klosek was lifted by the ship's gear and dropped to the pier. Under the authority of *L'Hote v. Crowell*, 54 F. 2d 212, subsequently ratified — as to liability or coverage — in *The Admiral Peoples*, 295 U.S. 649, 653, 654 (1935) she is entitled to recover.

It was hoped it would not be necessary to emphasize this distinction — which was reserved in our Brief — because of the policy approach expected of this Court. This important distinction is now expressly called to the attention of the Court.

## 4.

THE COURT MISINTERPRETED WHAT IT DESIGNATED AT THE "*JENSEN LINE*"; IF SUCH A THING AS A "*LINE*" IS REQUIRED THE TRADITIONAL WATER'S EDGE IS A NATURAL, FUNCTIONAL AND LOGICAL ONE.

In some of this Court's opinions, there have been inexact references to a so-called "*Jensen line*" or "*Jensen line of demarcation*" without any precise definition of what is meant by the term. In *Southern Pacific Company v. Jensen*, 244 U.S. 205 (1917) a longshoreman was killed while operating his electric truck on a ship's gangway; this Court took away from his widow an award entered in her favor under the New York State Compensation Act on the ground the application of state laws would defeat the "uniformity

and consistency at which the Constitution aimed" in the admiralty field. This Court refused to sanction the recovery because to do so would interfere "with the proper harmony and uniformity" of maritime law.

Three years later, in *Knickerbocker Ice Company v. Stewart*, 253 U.S. 149, this Court again upset a New York State award in favor of the widow of a worker who drowned on the ground that authorizing the States to enact covering statutes would destroy the "harmony and uniformity which the Constitution not only contemplated, but actually established. . . ." The final case of the trilogy was *Washington v. Dawson & Co.*, 264 U.S. 219 decided in 1924. This Court affirmed a denial of benefits to the dependents of a long-shoreman killed in the hold of a ship entered under the Workmen's Compensation Act of California. In the words of the Court:

"The subject is national. Local interests must yield to the common welfare. The Constitution is supreme."

If *Jensen* set a "line of demarcation" the line was only to restrain state activity in the forbidden area; it was not a limitation upon the right of the government to act in this sphere. (An application of *Jensen* would prevent the enforcement of a state statute in the maritime field.) In fact, *Dawson* expressly invited such action by the federal government a few years later. If there is such an entity as the "*Jensen* line" it must be the water's edge — the high water mark sometimes considered a possible terminus of admiralty jurisdiction; it certainly is not the pier's edge.

The holding of the Court that a pier is an extension of the land which, inferentially, destroys the navigability of the waters over which it extends, flies right in the teeth of earlier decisions of this body which so jealously safeguarded and enforced federal dominion over "navigable

waters". In *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 1941, this Court unequivocally held:

**"When once found to be navigable, a waterway remains so."**

There is no question the waters of the Patapsco River were navigable waters long before — and at the time of — the adoption of our Constitution. The construction of the High Pier in this century did not abolish their navigability.

As far back as 1875, in *Atlee v. N. W. Union Packet Co.*, 21 Wall 389, this Court held that piers are aids to navigations upon navigable waters and an unauthorized pier was an unlawful structure. Another leading case stressing the breadth of the navigability concept is *Economy Light & Power Co. v. United States*, 256 U.S. 113, 1921.

More recent cases which treat of this subject tangentially are *United States v. California*, 381 U.S. 139 (1965) which applied the low-water mark as the determining line for federal sovereignty over submerged lands and *Hughes v. Washington*, 389 U.S. 290, which held that the rights of an owner of federally-granted ocean-front property to accreted lands was governed by federal and not state law.

Finally, in *United States v. Louisiana*, 389 U.S. 155 (1967) there is an implicit repudiation of the fictional theory a pier is an extension of land. In a 6-1 opinion it was decided a **jetty was not an extension of land** to push the state's boundary beyond the normal 3 marine league mark. The Court held the **natural shoreline** of 1845 was the **correct line of demarcation** for measuring the three marine leagues. Since a pier does not extend the jurisdiction of a state — the correct measurement is still from the natural shoreline — the fiction a pier is an extension of land must fall before the consistent interpretation of navigable waters insisted on by this Court.

THE COURT ERRED IN ASSUMING PIERS ARE "PERMANENTLY" AFFIXED TO THE SHORE; EVEN WERE THIS ASSUMPTION CORRECT, NEITHER THE NAVIGABILITY OF THE WATERS THERE-UNDER NOR THE ADMIRALTY JURISDICTION OF THE FEDERAL COURTS WOULD BE AFFECTED.

In its opening sentence, as well as elsewhere through the opinion, the Court refers to "piers permanently affixed to shore". To give the lie to that assumption all one need do is stroll along the waterfront of any large harbor in the United States. New York City recently announced that 149 piers were being torn down. Vessels become obsolete and are scrapped; piers become rotted and deteriorated, and are torn down. No doubt a walk along the Potomac would convince a person that piers are quite temporary structures.

Irrespective of its permanency or absence of it, a pier does not change the boundaries of waterways one iota; the shoreline remains in its natural state. Navigable waters — the determinant of jurisdiction under the Longshoremen's Act — are established by the natural, historic boundaries of streams in their natural state irrespective of the presence or absence of man-made "fingers" which jut out above the surface of the waters.

Instead of being an extension of land, a pier which is in the nature of an aid to navigation is an extension of the ship, an oversized gangplank. A pier in the maritime sense cannot be conceived of except in connection with navigable waters and a ship. Servicing a vessel — facilitating the loading or discharging — is its *raison d'être*. As *Johnson Co. v. Garrison*, 234 U.S. 251, 268, a 1914 decision, reminds us "the mooring of a vessel is as necessary as its movement." In the immigration case of *U. S. v. Yee Nee How*, 105 F. Supp. 517 (1952) the District Court for the Southern District of California came to the common sense conclusion that a pier is an extension of the ship.

Part of this thesis has been treated in more detail in Point 4, *supra*.

## CONCLUSION

The seaman's seaworthiness doctrine has come a long way since its modest beginning in 1903; similarly the Longshoreman's seaworthiness doctrine has made great strides since its promulgation in 1946. The seaworthiness doctrine and the Longshoremen's Act are both traceable to a common origin — a deep-rooted solicitude for maritime workers who spend their lives in such a perilous and arduous calling.

The seaworthiness doctrine has grown and developed down through the years; so, too, must the Longshoremen's Act live, grow and expand with the broadening concepts of Admiralty jurisdiction. It cannot remain **perpetually fossilized** in the form of what may have been the **Admiralty concepts of 1927**. The mighty 43-year old oak cannot be thrust back into its embryonic acorn.

The decision in these consolidated cases is particularly disturbing not only because of its harshness, incongruity and inequity, but also because it marks the Court's first restrictive holding in maritime compensation cases since its self-confessed "ill-starred" *Jensen* case and its progeny, *Knickerbocker Ice* and *Dawson*. Since 1924 there has been a steady procession of decisions in which this Court has manifested its solicitous concern and compassion for maritime workers and their dependents.

The "score card" of some of the more notable compensation cases is:

<i>Parker v. Motor Boat Sales</i> , 314 U.S. 244 (1941)	9-0
<i>Davis v. Department of Labor</i> , 317 U.S. 249 (1942)	7-1
<i>Avondale</i> , <i>supra</i> (1953)	8-0
<i>Voris</i> , <i>supra</i> (1953)	9-0

<i>Calbeck, supra</i> (1962)	6-2
<i>Gondeck v. Pan American World Airways, Inc.</i> , 382 U.S. 25 (1965)	7-1
<i>Banks v. Chicago Grain Trimmers Association, Inc.</i> , 390 U.S. 459 (1968)	8-0

A comparable analysis could be compiled with respect to seamen and third party longshoremen claims. Illustrative are:

<i>O'Donnell, supra</i> (1943)	9-0
<i>Hahn v. Ross Island Sand &amp; Gravel Co.</i> , 358 U.S. 272 (1959) (Option to choose more favorable law)	5-2
<i>Reed, supra</i> (1963)	7-2
<i>Gutierrez, supra</i> (1963)	8-1

Underscoring that restrictive holdings have no place in the application of maritime law and Admiralty principles in personal injury and death actions, Justice Chase stated in *The Sea Gull* (Cir. Ct. Md., 1865) 21 Fed. Cases, page 909, Case No. 12578:

"... certainly it **better** becomes the humane and liberal character of proceedings in **Admiralty to give than to withhold the remedy**, when not required to withhold it by established and inflexible rules."

The Court is urgently petitioned to grant a rehearing, reconsider and reverse its earlier action in order that this 1970 Court may not be criticized for another ill-starred *Jensen* based decision depriving the widow and dependents of a longshoreman of the award mandated by the Court of Appeals for the Fourth Circuit, one of the most erudite Circuits in Admiralty matters.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that copies of the foregoing Petition for Rehearing were served on the following attorneys for all parties herein by mailing them, postage prepaid, on this 16th day of January 1970.

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# SUPREME COURT OF THE UNITED STATES

Nos. 9 AND 16.—OCTOBER TERM, 1969

Nacirema Operating Co., Inc..  
et al., Petitioners,

9 v.

William H. Johnson et al.

John P. Traynor and Jerry C.  
Oosting, Deputy Commis-  
sioners, Petitioners,

16 v.

William H. Johnson et al.

On Writs of Certiorari  
to the United States  
Court of Appeals for  
the Fourth Circuit.

[December 9, 1969]

MR. JUSTICE WHITE delivered the opinion of the Court.

The single question of statutory construction presented by these cases is whether injuries to longshoremen occurring on piers permanently affixed to shore are compensable under the Longshoremen's and Harbor Workers' Compensation Act of 1927, 44 Stat. 1424, 33 U. S. C. §§ 901-950.

Johnson and Klosek were employed by the Nacirema Operating Company as longshoremen; Avery was similarly employed by the Old Dominion Stevedoring Corporation. All three men were engaged at the time of their accidents in performing similar operations as "slingers," attaching cargo from railroad cars located on piers<sup>1</sup> to ships' cranes for removal to the ships. Klosek was killed, and each of the other men was injured, when cargo hoisted by the ship's crane swung back and knocked him to the pier or crushed him against the side of the

<sup>1</sup> The piers involved extended from shore into the Patapsco River at Sparrows Point, Maryland, and into the Elizabeth River at Norfolk, Virginia.

railroad car. Deputy Commissioners of the United States Department of Labor denied claims for compensation in each case on the ground that the injuries had not occurred "upon the navigable waters of the United States" as required by the act.<sup>2</sup> The District Courts upheld the Commissioners' decisions. 243 F. Supp. 184 (D. C. Md. 1965); 245 F. Supp. 51 (D. C. E. D. Va. 1965). The Court of Appeals for the Fourth Circuit, sitting *en banc*, reversed.<sup>3</sup> 398 F. 2d 900 (1968). We granted certiorari, 393 U. S. 976, to resolve the resulting conflict with decisions in other circuits holding that pier injuries are not covered by the Act.<sup>4</sup> We have concluded from an examination of the language, purpose, and legislative history of the Act, as well as prior decisions of this Court, that the judgment of the Court of Appeals must be reversed.

Since long before the Longshoremen's Act was passed, it has been settled law that structures such as wharves

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<sup>2</sup> § 3 (a) of the Act, 33 U. S. C. § 903 (a), provides in relevant part:

"(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. . . ."

<sup>3</sup> The three cases were consolidated on appeal. In a fourth case, an award to a longshoreman who had drowned after being knocked off a pier into the water was affirmed by the District Court and the Court of Appeals. *Marine Stevedoring Corp. v. Oosting*, 238 F. Supp. 78 (D. C. E. D. Va. 1965).

<sup>4</sup> *Nicholson v. Calbeck*, 385 F. 2d 221 (C. A. 5th Cir. 1967), cert. denied, 389 U. S. 1051 (1968); *Houser v. O'Leary*, 383 F. 2d 730 (C. A. 9th Cir. 1967), cert. denied, 390 U. S. 954 (1968); *Travelers Insurance Co. v. Shea*, 382 F. 2d 344 (C. A. 5th Cir. 1967), cert. denied, 389 U. S. 1050 (1968); *Michigan Mutual Liability Co. v. Arrien*, 344 F. 2d 640 (C. A. 2d Cir.), cert. denied, 382 U. S. 835 (1965).

and piers, permanently affixed to land, are extensions of the land.<sup>5</sup> Thus, literally read, a statute which covers injuries "upon the navigable waters" would not cover injuries on a pier even though the pier, like a bridge, extends over navigable waters.<sup>6</sup>

Respondents urge, however, that the 1927 Act, though it employs language which determines coverage by the "situs" of the injury, was nevertheless aimed at broader coverage: coverage of the "status" of the longshoreman employed in performing a maritime contract. We do not agree. Congress might have extended coverage to all longshoremen by exercising its power over maritime contracts.<sup>7</sup> But the language of the Act is to the con-

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<sup>5</sup> *Swanson v. Marra Bros., Inc.*, 328 U. S. 1 (1946); *Minnie v. Port Huron Terminal Co.*, 295 U. S. 647 (1935); *T. Smith & Sons, Inc. v. Taylor*, 276 U. S. 179 (1928); *State Industrial Commission v. Nordenholt Corp.*, 259 U. S. 263 (1922); *Cleveland Terminal & Valley RR. Co. v. Cleveland S. S. Co.*, 208 U. S. 316 (1908); *The Plymouth*, 3 Wall. 20 (1866); Benedict on Admiralty §§ 28, 29 (6 ed.); Gilmore & Black, *The Law of Admiralty* §§ 6-46, 7-17 (1957 ed.); Robinson on Admiralty § 11 (1939 ed.).

<sup>6</sup> We reject the alternative holding of the Court of Appeals that all injuries on these piers, despite settled doctrine to the contrary, may now be considered injuries on navigable waters—a proposition rejected implicitly by a unanimous Court just last Term. See *Rodrigue v. Aetna Casualty Co.*, 395 U. S. 352, 360, 366 (1969). Piers, like bridges, are not transformed from land structures into floating structures by the mere fact that vessels may pass beneath them.

<sup>7</sup> The admiralty jurisdiction in tort was traditionally "bounded by locality," *De Lovio v. Boit*, 7 Fed. Cas. 418, 444 (C. C. D. Mass. 1815) (Story, J.) (followed in *Insurance Co. v. Dunham*, 11 Wall. 1 (1871)), encompassing all torts that took place on navigable waters. By contrast, admiralty contract jurisdiction "extends over all contracts, (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations,) which relate to the navigation, business or commerce of the sea." *De Lovio v. Boit*, *supra*, at 444. Since a workmen's compensation act com-

trary and the background of the statute leaves little doubt that Congress' concern in providing compensation was a narrower one.

Ten years before the Act was passed this Court in *Southern Pacific Co. v. Jensen*, 244 U. S. 205 (1917), held that a State was without power to extend a compensation remedy to a longshoreman injured on the gangplank between the ship and the pier. The decision left longshoremen injured on the seaward side of the pier without a compensation remedy, while longshoremen injured on the pier enjoyed the protection of state compensation acts. *State Industrial Commission v. Nordenholt Corp.*, 259 U. S. 263 (1922).

Twice Congress attempted to fill this gap by passing legislation which would have extended state compensation remedies beyond the line drawn in *Jensen*.<sup>8</sup> Each time, this Court struck down the statute as an unlawful delegation of congressional power. *Washington v. Dawson & Co.*, 264 U. S. 219 (1924); *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149 (1920). Finally, responding to this Court's suggestion that what Congress could not empower the States to do, it could do itself,<sup>9</sup> Congress passed the Longshoremen's Act. The clear implication is that in enacting its own compensation statute, Con-

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bines elements of both tort and contract, Congress need not have tested coverage by locality alone. As the text indicates, however, the history of the Act shows that Congress did indeed do just that.

<sup>8</sup> Act of October 6, 1917, 40 Stat. 395; Act of June 10, 1922, 42 Stat. 634.

<sup>9</sup> *Washington v. Dawson & Co.*, 264 U. S. 219, 227 (1924). The passage from *Dawson & Co.* was referred to in the hearings in both the Senate and the House. See Hearings on S. 3170 before a Subcommittee of the Senate Committee on the Judiciary, 69th Cong., 1st Sess., 18, 31, 103 and n. 3 (1926) (hereinafter "Senate Hearings"); Hearings on H. R. 9498 before the House Committee on the Judiciary, 69th Cong., 1st Sess., ser. 16, at 18, 119 and n. 3 (1926) (hereinafter "House Hearings").

gress was trying to do what it had failed to do in earlier attempts: to extend a compensation remedy to workmen injured beyond the pier and hence beyond the jurisdiction of the States. This purpose was clearly expressed in the language limiting coverage to injuries occurring "upon the navigable waters," and permitting recovery only "if recovery . . . through workmen's compensation proceedings may not validly be provided by state law."<sup>10</sup>

This conclusion is fully supported by the legislative history. As originally drafted, § 3 extended coverage to injuries "on a place within the admiralty jurisdiction of the United States, except employment of local concern and no direct relation to navigation or commerce."<sup>11</sup> During the hearings, it was repeatedly emphasized and apparently assumed by representatives from both the shipping industry and the unions that a "place within the admiralty jurisdiction" did not include a dock or pier.<sup>12</sup> In fact, a representative of the Labor Depart-

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<sup>10</sup> Drydocks were conceded to be within the admiralty jurisdiction in both the hearings and the debates, even though such structures are not always floating structures. See House Hearings, at 34; 68 Cong. Rec. 5403 (1927). If Congress had thought the words "upon the navigable waters" were broad enough to embrace the limits of admiralty jurisdiction, there would have been no need to add the parenthetical "(including any drydock)."

<sup>11</sup> See Senate Hearings, at 2.

<sup>12</sup> Mr. Dempsey, representing the International Longshoremen's Association, testified that the bill would cover injuries on the dock as well as on the ship. When pressed as to how injuries on the dock could come within the admiralty jurisdiction, he confessed he did not understand the legal theory, and would defer to the longshoremen's attorney, Mr. Austin. Mr. Austin proceeded to testify: that the dock was not within the admiralty jurisdiction; that injuries on the dock were compensable under state law; that the problem arose because the longshoreman was left "high and dry" once he left the State's jurisdiction and stepped on the gangplank; and that "[t]hat is the gap that we are trying to fill . . . ." Senate Hearings 26-27, 30-31. Testimony that longshoremen injured on the docks

ment objected to the bill precisely for that reason, urging the Committee to extend coverage to cover the contract, "and not the man simply when he is on the ship."<sup>13</sup> If Congress had intended to adopt that suggestion, it could not have chosen a more inappropriate way of expressing its intent than by substituting the words "upon the navigable waters" for the words "within the admiralty jurisdiction."<sup>14</sup> Indeed, the Senate Report which accompanied the revised bill, containing the language of the present Act, makes clear that the suggestion was rejected, rather than adopted: "[I]njuries occurring in

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would not be covered by the Act also came from representatives of the shipbuilders. See Senate Hearings, at 58, 95, 103. See also n. 15, *infra*; Hearings on S. 3170 before the House Committee on the Judiciary, 69th Cong., 1st Sess., ser. 16, pt. 2, at 141, 157 (1926) (testimony on the revised bill, containing the language of the present § 3).

<sup>13</sup> *Id.*, at 40.

<sup>14</sup> While the reason for the change in the language concerning the bill's coverage is not expressly indicated, it appears to have been a response to objections that the original language, carving out an exception for employment of "local concern," was too vague to define clearly the line being drawn, and might even encounter problems once again at the hands of this Court. See Senate Hearings, at 56-57, 95; House Hearings, at 77, 100. In fact, the same spokesman for the shipbuilders who objected to the vagueness of the "local concern" exception, also objected that the bill as written might "upset all the present arrangements with respect to compensating men on the dock." Senate Hearings, at 57. The implication is that no one expected the federal law to extend into the area of the State's jurisdiction on the dock, but that confusion existed as to whether, conversely, state remedies would be exclusive as to injuries "on navigable waters" but within the "maritime but local" exception created by *Grant Smith-Porter Ship Co., v. Rohde* 257 U. S. 469 (1922). This reading of the legislative history was adopted in *Calbeck v. Travelers Insurance Co.*, 370 U. S. 114, 121-127, where the Court concluded that the Act did not prevent recovery for injuries on navigable waters, even though a state remedy would also have been available under *Rohde*.

loading or unloading are not covered unless they occur on the ship or between the wharf and the ship so as to bring them within the maritime jurisdiction of the United States." S. Rep. No. 973, 69th Cong., 1st Sess., 16. We decline to ignore these explicit indications of a design to provide compensation only beyond the pier where the States could not reach. "That is the gap we are trying to fill."<sup>15</sup> In filling that gap Congress did not extend coverage to longshoremen like respondents whose injuries occurred on the landward side of the *Jensen* line, clearly

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<sup>15</sup> See n. 11, *supra*. Other indications that Congress had no intention of replacing or overlapping state compensation remedies for dockside injuries can be found throughout the hearings. At one point, in attempting to calculate the increased costs involved in the federal Act, Senator Cummins, Chairman of the Committee, pointed out that "we are proceeding on the theory that these people cannot be compensated under the New York compensation law or any other compensation law." "The purpose of this law," he agreed with a witness, was simply to cover the men who "are going to be exposed a part of the time on board vessels . . . and therefore will have to be compensated in some other way where the New York law is not the remedy available." Senate Hearings, at 84-85. Similarly, Representative Graham, Chairman of the House Committee, agreed that "the real necessity for this legislation" was to provide workers with compensation when they stepped from dock to ship. House Hearings, at 25. In fact, the labor representative who was testifying at that point in the hearings insisted that the legislation sought was only for "those who are injured on board vessels at the dock." Those injured on the dock "are taken care of under the State law." *Id.*, at 28. There was also testimony by a longshoremen's representative that "65 per cent of the accidents in the courts of New York happen on board ships or on gangplanks; . . . therefore . . . 65 per cent of the accidents of the men who are injured by performing this work will be compensable under this bill." *Id.*, at 35. See also *id.*, at 44. Another noted that "our men that are working on the dock are protected, and well protected, under the New York compensation act, but our men on board ship are not protected. We feel that Congress wants to protect them . . ." Senate Hearings, at 42.



entitling them to protection under state compensation Acts.<sup>16</sup>

Decisions of this Court have more than once embraced this interpretation. *Swanson v. Marra Bros. Inc.*, 328 U. S. 11 (1946), held that neither the Jones Act nor the Longshoremen's Act covered a longshoreman injured on the dock in the course of his employment even if the injury was caused by a vessel on navigable waters. *Parker v. Motor Boat Sales*, 314 U. S. 244, 249 (1941), concluded that the purpose of the Act "was to provide for federal compensation in the area which the specific decisions referred to placed beyond the reach of the states." *Davis v. Dept. of Labor & Industries*, 317 U. S. 249, 2256 (1942), noted that in passing the Longshoremen's Act, Congress had specifically adopted the *Jensen* line. The interpretation endorsed by these cases is also reflected in a consistent course of administrative construction commencing immediately after the enactment of the Act. Employee's Compensation Commission Opinions, 5, 16, 30, 1927 A. M. C. 1558, 1855; 1928 A. M. C. 417.

It is true that since *Jensen* this Court has permitted recovery under state remedies in particular situations seaward of the pier, *Parker v. Motor Boat Sales*, *supra*, and in *Calbeck v. Travelers Insurance Co.*, 370 U. S. 114 (1962), approved recovery under the Longshoremen's Act for injuries occurring on navigable waters which might also have been compensable under state law. *Calbeck* made it clear that Congress intended to exercise its full jurisdiction seaward of the *Jensen* line and to cover all injuries on navigable waters, whether or not state compensation was also available in par-

<sup>16</sup> Both Johnson and Klosek's widow and minor children have filed claims, and are concededly entitled to benefits, under the Maryland Workmen's Compensation Act. Avery has already been awarded benefits under the Virginia Workmen's Compensation Law.

ticular situations. The proviso to § 3 (a) conditioning coverage on the unavailability of state remedies was not meant to deny federal relief where the injury occurred on navigable waters. But removing uncertainties as to the Act's coverage of injuries occurring on navigable waters is a far cry from construing the Act to reach injuries on land traditionally within the ambit of state compensation acts.

Indeed, *Calbeck* freely cited the *Parker* and *Davis* declarations that the Longshoremen's Act adopted the *Jensen* line, and *Calbeck's* holding rejected the notion that the line should advance or recede simply because decisions of this Court had permitted state remedies in narrow areas seaward of that line. Otherwise, the reach of the federal Act would be subject to uncertainty, and its coverage would "expand and recede in harness with developments in constitutional interpretation as to the scope of state power to compensate injuries on navigable waters," with the result "that every litigation raising an issue of federal coverage would raise an issue of constitutional dimension, with all that implies . . . ." 370 U. S., at 126. As in *Calbeck*, we refuse to impute to Congress the intent of burdening the administration of compensation by perpetuating such confusion.

Nor can we agree that what Congress did not do in 1927, it did in 1948 when it passed the Extension of Admiralty Jurisdiction Act, 62 Stat. 496, 46 U. S. C. § 740 (Extension Act). In pertinent part, that Act provides:

"The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."

By its very choice of language, the Act reenforces the conclusion that Congress was well aware of the distinction between land injuries and water injuries and that when it limited recovery to injuries on navigable waters, it did not mean injuries on land. The Act no doubt extended the admiralty tort jurisdiction to ship-caused injuries on a pier. But far from modifying the clear understanding in the law that a pier was an extension of land and that a pier injury was not on navigable waters but on land, the Act accepts that rule but nevertheless declares such injuries to be maritime torts if caused by a vessel on navigable waters.

The Extension Act was passed to remedy the completely different problem which arose from the fact that parties aggrieved by injuries done by ships to bridges, docks, and the like could not get into admiralty at all.<sup>17</sup> There is no evidence that Congress thereby intended to amend or affect the coverage of the Longshoremen's Act or to overrule *Swanson v. Marra Bros.*, *supra*, decided just two years earlier.<sup>18</sup> While the Extension

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<sup>17</sup> See Gilmore & Black, *The Law of Admiralty*, § 7-17 (1957 ed.).

<sup>18</sup> The legislative history of the Extension Act is devoid of any reference to the Longshoremen's Act, as might well be expected in an act dealing with a wholly unrelated problem. See S. Rep. No. 1593, 80th Cong., 2d Sess. (1948); H. R. Rep. No. 1523, 80th Cong., 2d Sess. (1948).

The House Report accompanying the Extension Act notes that "the bill will not create new causes of action," *id.*, at 3, and the statute speaks of extending jurisdiction to "suits in rem or in personam" for "damages" to "person or property"—concepts wholly at odds with the theory of workmen's compensation—awards made in an administrative proceeding. The conclusion of the District Court is inescapable. "The two statutes do not deal with the same subject matter, are inherently inconsistent with each other and cannot be read as being in *pari materia*." 243 F. Supp. 184, 194.

It is worth noting that a contemporaneous amendment of the Longshoremen's Act contains no cross reference to the Extension Act. See Pub. L. No. 757, 62 Stat. 602 (a bill to increase benefits

sion Act may have the effect of permitting respondents to maintain an otherwise unavailable libel in admiralty,<sup>19</sup> see *Gutierrez v. Waterman S. S. Corp.*, 373 U. S. 206 (1962), the Act has no bearing whatsoever on their right to a compensation remedy under the Longshoremen's Act.

There is much to be said for uniform treatment of longshoremen injured while loading or unloading a ship. But even construing the Extension Act to amend the Longshoremen's Act would not effect this result, since longshoremen injured on a pier by pier-based equipment would still remain outside the Act. And construing the Longshoremen's Act to coincide with the limits of admiralty jurisdiction—whatever they may be and however they may change—simply replaces one line with another whose uncertain contours can only perpetuate on the landward side of the *Jensen* line, the same confusion which previously existed on the seaward side. While we have no doubt that Congress had the power to choose either of these paths in defining the coverage of its compensation remedy, the plain fact is that it chose instead the line in *Jensen* separating water from land at the edge of the pier. The invitation to move that line landward must be addressed to Congress, not to this Court.

*Reversed.*

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under the Longshoremen's Act, passed five days after the Extension Act). And, a House Report dated July 28, 1958—10 years after enactment of the Extension Act—points out that employees "on the navigable waters of the United States" are covered under the Longshoremen's Act, but are under state protection "when performing work on docks and in other shore areas." H. R. Rep. No. 2287, 85th Cong., 2d Sess., 2 (accompanying a bill to provide safety programs for longshoremen).

<sup>19</sup> We were informed in argument that two of the parties have in fact already commenced actions against the shipowner.

# SUPREME COURT OF THE UNITED STATES

Nos. 9 AND 16.—OCTOBER TERM, 1969

Nacirema Operating Co., Inc.,  
et al., Petitioners,

9 v.

William H. Johnson et al.

John P. Traynor and Jerry C.  
Oosting, Deputy Commis-  
sioners, Petitioners,

16 v.

William H. Johnson et al.

On Writs of Certiorari  
to the United States  
Court of Appeals for  
the Fourth Circuit.

[December 9, 1969]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK and MR. JUSTICE BRENNAN concur, dissenting.

We dissent for the reasons stated by Judge Sobeloff speaking for the Court of Appeals sitting *en banc*. 398 F. 2d 900. As he says, the Longshoremen's and Harbor Workers' Compensation Act is not restricted to conventional "admiralty tort jurisdiction" but is "status oriented, reaching all injuries sustained by longshoremen in the course of their employment." *Id.*, at 904. The matter should be at rest after *Calbeck v. Travelers Ins. Co.*, 370 U. S. 114. In that suit under this Act we said that "Congress intended the Compensation Act to have a coverage co-extensive with the limits of its authority." *Id.*, at 130, quoting from *De Bardeleben Coal Co. v. Henderson*, 142 F. 2d 481, 483. Judge Sobeloff in the instant case, while answering the argument that *Calbeck* was not concerned with the meaning of "upon the navigable waters," referred to Judge Palmieri's opinion in

*Michigan Mutual Liability Co. v. Arrien*, 233 F. Supp. 496, 500, aff'd, 344 F. 2d 640:

"[w]hat is just as important as the actual holding in *Calbeck* is the general approach to the [Longshoremen's Compensation] Act taken by the Court. No longer is the Act viewed as merely filling in the interstices around the shore line of the state act, but rather as an affirmative exercise of admiralty jurisdiction."

Judge Sobeloff went on to say:

"This affirmative exercise of the admiralty power of Congress 'to the fullest extent' of its jurisdiction, creating 'a coverage co-extensive with the limits of its authority,' can only mean that Congress effectively enacted a law to protect all who could constitutionally be brought within the ambit of its maritime authority. Again, in the words of Judge Palmieri, 'it thus appears that "upon navigable waters" is to be equated with "admiralty jurisdiction." ' " 398 F. 2d, at 905.

In addition to the cases being reviewed here, the Court of Appeals affirmed a judgment in favor of the widow of a longshoreman (238 F. Supp. 78), who, while working on the pier, was struck by a cable and knocked into the water where he died. It is incongruous to us that in an accident on a pier over navigable waters coverage of the Act depends on where the body falls after the accident has happened. For this and the other reasons stated by Judge Sobeloff, we dissent from a reversal of this judgment.